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EUNOMUS:

OR,

DIALOGUES

CONCERNING THE

LAW AND CONSTITUTION

OF

ENGLAND.

WITH

An Essay on Dialogue.

VOLUME THE FOURTH.

L O N D O N :

Printed for BENJAMIN WHITE, at Horace's
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U N I O N

N I O L T E V S

CONSTITUTION

THREE DIALOGUES

CONCERNING THE

LAW AND CONSTITUTION

OF THE

E W G E A W D



Count the books I have
To have my writings read
These I lay by for time
And thou mayst at thy leisure read

Prior's Alma, Cam. H.

THE UNIVERSITY OF CAMBRIDGE

LIBRARY

NO. 100

N O T E S
ON THE
THREE DIALOGUES
CONCERNING THE
LAW AND CONSTITUTION
OF
E N G L A N D.

Count the proofs I have collected,
To have my writings well protected ;
These I lay by for time of need,
And thou may'st at thy leisure read.

PRIOR'S Alma, Cant. II.

PRELACE

TO THE

OF THE

NOTES

THIS part of the work having been put together some time after the date of the rest, and yet being in a manner, the support of the whole fabric; it is necessary to say one word, as to what arises from so considerable a variation in point of time, before I enter on the immediate subject of the present observations, the Notes themselves.

I only desire, in order to lessen some imperfections that arise from this very source, to establish the authenticity of the dates themselves, and trust the Reader will give me credit for the assertion

where

P R E F A C E

T O T H E

N O T E S.

***T**HIS part of the work having been put together some time after the date of the rest, and yet being, in a manner, the support of the whole fabric; it is necessary to say one word, as to what arises from so considerable a variation in point of time, before I enter on the immediate subject of the present observations, the Notes themselves.*

I only desire, in order to lessen some imperfections that arise from this very source, to establish the authenticity of the dates themselves, and trust the Reader will give me credit for the assertion

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when I assure him, that the Dialogues and Notes were actually written and printed at the respective times they bear date: and that the Notes, though originally conceived as a necessary accompaniment in some shape or other, were not till very lately brought into their present shape.

This observation will entitle me to some indulgence, in passing over some little improprieties in the Dialogues, which are to be laid to the account of time only.

In one place, for instance, there is an allusion to a set of characters that at the time all united in displaying their excellence in the same scene of action, * but are now dispersed in various departments; some in the most elevated rank in the State, as well as in the Profession. Had I not in that part of the

* About the year 1767.

Dialogue

Dialogue rested content with a faint allusion to a few private characters, the text would have still wanted a greater comment: the elevation of some from the bar to the bench; the quick transitions from one bench to another; and the various successions on the same bench, would all have contributed to depreciate the design of drawing a portrait, that was to be known only from the robes given it by the painter; especially when, after all, those great models will be much better characterised by their own eloquence and abilities, in colours that will scarce fade, till time itself does. Had I indeed attempted, for instance, to describe those three very eminent persons, now living, who have been last successively appointed to preside in one single Court of Law, I should have shrunk under the weight of my subject. How again could one feeble voice echo those notes, which the Muse itself

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had sounded so long ago, when it proclaimed the Fame of him

—Whom nature, learning, birth conspir'd
To form not to admire but be admir'd.

Who, besides himself, can do justice to a reputation that, like a river, is perpetually spreading in its course, till it is lost in the great ocean of Eternity? Fortunately therefore for me, the canvass was left a blank, not only from the difficulty of the undertaking, but as, in many instances, time so soon varies the portrait.

Things are, in their nature, more fixed and invariable than persons: and if the great outlines of the Constitution are deduced from principles (as it is hoped they are) there will be less reason to apprehend the work will suffer in its material parts, by the accidental fluctuation of this or that prevailing party.

* Pope's Imitat. of Horace, ep. 6. v. 39.

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or opinion. Many points in the principal Dialogue have been the subject of public debate, as well as private discourse, since the writing it: I can only say, however my sentiments happen to coincide or disagree with those of the world, truth alone was my object at the time; and however a juvenile fancy may have unawares dressed up error in its form, I may sincerely assert that I have in no one instance endeavoured to mislead or misrepresent. This will entitle me to candour from all who profess to differ from me; though I should add, I am not conscious that I have advanced any thing material upon the subject that ought to be retracted. If I have done this in one or two minute trivial citations, it would very ill become me to defend an opinion in points of importance against conviction.

Indeed

PREFACE to the NOTES.

Indeed I was so little satisfied with leaving a discussion of so great a subject as that of the English Law and Constitution, on the mere reasoning of the persons in an imaginary drama, that I all along conceived a design of communicating to the reader, some of those authorities which, from general reading, had led me into such a train of thinking. As I was ambitious of having what was advanced, have more weight than what the air of conversation alone will allow it, (notwithstanding all the advantages proposed to myself from the form of discourse) I could not leave it to be supported merely by the declarations of the speakers: and therefore as "these our actors (like those of Prospero in the Tempest) are now melted into air;" it was incumbent on me at the end of the play, to dissolve the enchantment, and shew things fairly

PREFACE to the NOTES. xi

to the reader as they are. And it will be, no doubt, a satisfaction to find the notes prevent giving unlimited credit to the text: that it is Lord Coke, for instance, that often speaks by Eunomus, without the formality of being mentioned: and that, by a kind of Pythagorean transmigration, several great sages, both of antient and modern times, are in a manner made to animate the fictitious persons of the Dialogue.

Reason and example both induced me to separate the notes entirely from the text. Great authorities may be urged for it, both in History and in Dialogue. The laws of conversation in particular, would disdain the affectation of citing page and verse: and the notes thus set apart, may support, without embarrassing the composition.

This place too, if any, will justify some considerable extracts made from books in different

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different languages, from a desire to do justice to the authors sentiments by giving them in their own original expression. In this respect what would be unpardonable in the Dialogue, it is hoped, does not want excuse in the notes. Many an English gentleman would with reason be displeased at being made party by surprise to a conversation made up of as many different languages as the persons who composed the company: But nobody who was carried to the Royal-Exchange, which he was told beforehand was the resort of merchants of different nations, would be out of humour at hearing a Greek, an Italian, or a Frenchman, speak in his own language. Every body in this case has his own remedy, either not to go among them; or not to listen to them at all, if they are unintelligible. If, when it was meant to make some of them more generally communicative, our friends of
antient

ancient Greece have had the misfortune to have but a lame interpreter; the learned with their usual candour will overlook it.

The notes themselves have, unawares, grown in their progress; their plan having been extended in the execution much beyond the original design: as they now comprehend several occasional remarks, as well as the authorities abovementioned. Some few other particulars must just be mentioned. To keep them within a tolerable compass, it was thought much more adviseable in general to refer to the books, rather than to cite the passages in them alluded to in the Dialogue. Wherever various editions are cited, they are pointed out.

As to the reasonableness of the present bulk of the Notes, I am the last judge in the world in my own cause; but though it is more probable I am

guilty

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guilty in the excess than in the defect, yet it may be thought I have been too sparing in some places, however over-copious in general; many entire pages, in succession, being totally unnoticed in this review, and the argument left to stand or fall by its own weight*. To this I can only say, that in those places no particular authority could be cited, because none, in reality, was particularly in view. The passages in those instances being conclusions formed in the mind in a train of thinking, acquired from a course of reading; and the particulars that gave the first rise to them, had long vanished, and were no more to be recalled in the memory, than a picture in the mirror when the object has disappeared.

As for instance, in Dial. II. in the general analysis of Practice, and Dial. III. in the sketch of Jurisdiction; the reasoning from the law of nature, in the latter end; and the historical recapitulation, &c. &c.

I flatter

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I flatter myself, the great variety of authors that have been referred to, by way of authority or illustration, in the course of these notes, will rather prove an apology for the whole performance, than stand in need of one. At least, if the reader has the same pleasure in going back to the fountain head, that I found in drawing from thence, we shall neither of us repent of our pains, and why should we not part good friends with each other? In those hopes, at the conclusion of the work, I will finally address my Readers in an humble application of the words of the celebrated President de Thou, in his letter to Henry the Fourth of France, prefixed to his History.

“ A nostris aliisque, qui hæc legent, peto, ne quid præjudicati secum domo adferant; neque de hoc opere priusquam eo perlecto pronuntient. Inceptum viribus nostris majus

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“ jus esse, et ad illud multa, quæ in
“ me non sint, desiderari, inficias non
“ ierim : sed vicit utilitas publica et
“ ardens de mea posterâque ætate pro-
“ merendi studium, cui dum confu-
“ lerem, temerarius quam ingratus
“ haberi malim.”

NOTES

NOTES
ON THE
DIALOGUES
CONCERNING
The LAW and CONSTITUTION of
ENGLAND.

NOTES on the ESSAY on DIALOGUE.

PAGE vi. line 1. *Choice of Hercules.*] This beautiful allegory has been imitated by some masterly hands; in our own language, it has been the subject of the excellent poem inserted in Spence's Polymetis, and Doddsley's Collection, vol. iii. and in Italian by Metastasio in his Alcide al Bivio. vol. x.

Page vii. line 14. *Invention and fancy are of the essence of Poetry.*] A similar idea in Mr. Gray's admirable ode, where the *Poet's* eye is represented as discovering

*Such forms, as glitter in the Muse's ray
With orient hues, unborrow'd of the Sun.*

Page viii, line 5. *Any composition, if coloured over by fiction, approaches more or less to the nature of poetry.*] “Il est de beaux poemes sans vers comme il est de beaux vers sans poésie, et de beaux tableaux sans une riche coloris,” says the Abbé du Bos, Reflex. Critiq. vol. i. c. 48. And to the same purpose Boileau adds, “Ces poemes en prose que nous appelons Romans, &c.” Lett. 4th to Mons. Perault. And one, whose example in writing the serious and comic, has not a little fortified his opinion, tells us—“que la Epica tambien puede escribirse en Prosa como en verso.”

Page xi. line 7. *A Poet will sometimes throw events into Allegory, &c.*] It seemed not amiss, to add an instance of each of these methods, which, though not all taken from professed didactic poems, will sufficiently explain what is meant in the Essay. 1. Will throw events, and ordinary occurrences into Allegory—as in describing the mixture of happiness or unhappiness in human life, in the proverbial style, by that of “cloud and sunshine,” or saying “the day is sometimes a mother, sometimes a step-mother.”

Ἄλλοτε δ' αὖ Ζεὺς μὲν πέλει αἰθρίας ἄλλοτε
 δ' οὐρα. Theocrit.

Ἄλλοτε Μητροῖν πέλει Ἡμέρα, ἄλλοτε Μητῆρ.
 Hesiod. Oper. et Dies. v. 825.

2. Will mark what he describes by probable
 consequences—as in the first Georgick.

*Sin macula incipient rutilo immiscerier igni,
 Omnia tunc pariter vento nimisque videbis
 Fervere. Non illâ quisquam me nocte per altum
 Ite, neque a terrâ moneat convellere funem.*
 Ver. 454.

3. Instead of formal comparisons will rather
 hint the resemblance in the application—as in
 that pretty fragment of Moschus on the
 death of Bion.

Αἱ Αἱ ται μαλαχαι μὲν ἐπ' ἀν κατὰ Καπον
 ὀλῶνται,
 Καὶ τὰ χλωρὰ σελίνα, τὸ τ' εὐθαλὲς ἔλῳν ἀνηθόν,
 Ὑσπερον αὖ ζῶντι, καὶ εἰς ἔτος ἄλλο φροντί.
 Ἀμμες δ' οἱ μεγάλοι, καὶ καρτεροί, ἢ σοφοί
 ἀνδρες
 Ὅπποτε πρῶτα θανώμες, ἀνακοοὶ ἐν χθονὶ κοῖλα,
 Εὐδομέες εὖ μαλὰ μακρὸν ἀτέμονα νηγρέτον
 ὑπνόν.
 Ver. 100.

*The Field, or Garden, many a plant supplies,
That after blooming at its season dies;
Yet only dies more blooming to appear,
The pride and glory of another year:*

*But we, however great, or brave, or wise,
When in "that Sleep of Death*" we close our eyes,
Still, after ages in the silent tomb,
Have the same long unbroken rest to come!*

The same kind of thought (not uncommon among the antient Poets) has been sweetly expressed by Tasso.

*Deb mira (egli cantò) spunter la rosa
Dal verde suo modesta, e verginella,
Che mezzo aperta ancora, e mezzo ascosa
Quanto si mostra men, tanto è più bella.
Ecco poi nudo il Sen già baldanzosa
Dispiega; ecco poi langue, e non par quella,
Quella non par, che desiata avanti
Fu da mille donzelle, e mille amanti.*

*Così trapassa al trapassar d'un giorno
Della vita mortale il fiore, e'l verde:
Nè perchè faccia indietro April ritorno,
Si rinfiora ella mai, nè si rinverde.*

Canto. 16. stanz. 14.

Page xl. line 14. *Considerable names among our own writers.*] To those mentioned may be added Lord Bacon's and the Duke of Buckingham's. Sir Thomas More is said to have written several dialogues. Wood's Life by Hearne, p. 31. but I do not find that they were ever published.

Page li. line 4. *The law is a polemical art.*] Lord Coke approves much of the saying of Sir Richard Hankford, a Judge in Henry the Fourth's time. "Home ne scavera de quel metal un campane est si ne soit bien bate, ne le ley bien conus sans disputation." 1 Inst. 395.

Page lvi. line 5. *Axiom.*] Lord Bacon, in his Advancement of Learning, has considered the respective merit of "axioms" and "queries" as applied to the tradition of knowledge in general. Vol. I. fol. edit. p. 71. and see Dr. Beattie on Truth, p. 31. and p. 208.

Page lix. line 16. *Famous law case.*] Bullhell's case in Vaughan's Report.

Page lxiv. line 9. *Has not left the reader in doubt of the true opinion for which some of the Antients have been censured.*] This conduct in some resulted chiefly from the principles of the academic Sect. Dr. Beattie has answered this imputation on Socrates, in his admirable Essay on Truth, p. 249, &c. 2d. Edit.—Many passages might be cited, from the Memorabilia of Xenophon, which are an undeniable vindication against this charge. See particularly, lib. 1. c. 1. § 19. ibid. c. 4. § 18. lib. 2. c. 6. § 5. ibid. c. 7. § 9. and Socrates himself has abundantly answered this insinuation, lib. 4. c. 4. § and c. 6.

Page lxv. line 2. *Attempt of the reigning favourite to bring in the Civil Law.*] William de la Poole, Duke of Suffolk, and others mentioned, 3. Inst. 35.

Page lxxxvi. line 6. *Dr. Middleton was told.*] See Dr. Rutherford's defence of Bp. Sherlock on Prophecy, p. 3.

Page lix. line 16. *Famulus laus tunc.*
N O T E S
 Blackwell's case in Vaughan's Report.

Page lxi. line 9. Has not left the reader
 in doubt of the true position for which some of
 the authorities have been cited? This con-
 dition is not a dialogue. I. Dr. Beattie
 principles of the academic sect.

PAGE 10. line 1. *And certainly the imi-
 tative arts must necessarily be capable of
 assisting each other.* The assistance poetry
 has afforded to the other imitative arts may
 be evident from the very early and well-
 known instance of Phidias's Jupiter, copied
 from the first Iliad. And it is somewhere
 imagined, with great probability, that in the
 famous picture of the sacrifice of Iphigenia
 by Timanthes, the admirable thought of ex-
 pressing the highest degree of grief "by the
 veil," was borrowed from Sophocles.

— Ως δ' ἔσειδ' ἐν Ἀγαμέμνωνι Ἀναξ.
 Ἐπὶ σφαγᾷς τεύχεσσαν εἰς αἰσος κορὴν
 Ἀνέσενάξ· κάμπανιν εὐρύας καρα.
 Δακρυὰ προήγεν, "Οἰμῶν πεπλὸν προθείς."

*When the great prince his lovely damsel saw
 Proceed a victim to the sacred grove,
 He groan'd; and rais'd his mantle to his face,
 To vent the torrent of his grief.—*

The history of that famous painting of Timanthes is described by Pliny, Nat. Hist. lib. 35. c. 10. where other instances of imitation from poets may be met with. On the other hand the poets (if they have not borrowed ideas from painters) have commended and described with rapture several pieces of sculpture and painting. The description in Virgil, lib. 8. v. 631.

*geminos huic ubera circum
 Ludere pendent pueros*

it is supposed was borrowed from the famous statue in the capitol, mentioned by Tully in one of his orations against Catiline. Dr. Middleton's Letter from Rome, 35.

And it is not improbable that the pictures at Carthage, described in the first Æneid, were remembrances of some pictures well known in Virgil's time. In the Anthologia

Græc.

DIALOGUE I.

9

Græc. lib. 4. the *Philotes* of *Parrhasius* is finely described; and in the same collection, the *cow* of *Myron*, and the *grapes* of *Zeuxis*.

In *Theocritus*, first *Idyll*, there is an almost graphical description of a piece of sculpture that was most likely then existing as the poet's model. Every body knows the fine compliment paid to the *Venus* of *Apelles* by *Ovid*.

Sic venerem Cois nunquam pinxisset Apelles

Mersa sub æquoreis usque lateret aquis.

And without being tedious in the mention of particulars, a catalogue "of antient pictures and sculptures" might almost be formed even from the Greek epigrams that remain.

The thought of *Timanthes* and *Sophocles* above mentioned, as to the manner of expressing grief, remind me of a very fine passage in *Euripides Iphigenia*, *aul. v. 465.* where the poet is equally successful in the artifice he uses to heighten his subject: a
very

very young infant is represented as bursting
into tears on the distress of the family; but
it is the poet's observation that gives those
tears their true force and energy.

Παῖον δ' Ὀπείης ἔγγυς ἀναβόηται

Οὐ σὺν ἡμῶν σὺν ἡμῶν ἔστι γὰρ ἐστὶν ἡμῶν.

*Orestes too with tears shall swell our grief,
Unknowing why he grieves, as yet a child.*

Shakespeare, in copying only nature, has
hit upon two or three similar instances; that I
cannot resist citing upon this occasion, as
happy comments on Euripides. In his *Co-
riolanus*,

"This boy, that cannot tell" what he would have,
But kneels and holds up hands for fellowship,
Does reason his petition with more strength
Than thou hast to deny it. Act 5. sc. 3.

In his comedy of *Errors*,
"Piteous plainings of the pretty babes,
That mourn'd for fashion", ignorant what to fear,
Forc'd even to seek delays for them and me. Act 1. sc. 1.

+ Underneath. Peruv. Book I & II
- Being for child among its toys
has caught the back of ear

As after some oration, fairly spoke
 By a beloved prince, there doth appear
 Among the buzzing, pleased multitude,
 Where every something, being blent together,
 Turns to a wild of nothing save of joy,
 "Express and not express."

Merch. of Ven. act 3, sc. 2.

In this latter passage, tho' the incident is totally different, yet the idea and expression is almost the same as that of Euripides.

But to conclude this subject: the resemblance, peculiarities, and mutual assistance of the arts of poetry and painting, has been excellently well described in Mr. Harris's three *Dialogues on Art, &c.* and by the Abbé du Bos in his *Reflexions Critiques*.

Page 12. line 17. *Merchants, upon more than one occasion, have told us, &c.*] See to this purpose the *Causes of the Decline of foreign Trade*, and Cary's *Essay on Trade*, and more modern works.

Ibid. line last. *The same incompetence has been insisted on in favour of ecclesiastical jurisdiction, in exclusion of the common Law.*]

This

This is one of those small blots in the Codex Juris Ecclesiastici, which, with other errors of that learned and useful work, has been copied with less excuse by other writers.

Page 13. line 17. *A passage in Xenophon, where Socrates recommends geometry and arithmetic as a general part of Education.]* The passage is this: *Εδιδασκε δὲ* (Socrates Sc.) *ἕ* *μέχρι οὗς δέοι ἐμπειρόν εἶναι ἑκάστου [πραγματικὸς τὸν ὀρθῶς πεπαιδευμένον § 2.—*Then, after considering geometry and astronomy, (§ 3. &c.) he comes to arithmetic, and subjoins the limitation to the study of each, alluded to in the text — *ἐκέλευσε δὲ ἕ* *λογισμὸς μανθάνειν ἕ* *τετῶν δὲ ὁμοίως τοὺς ἄλλοις ἐκέλευσε φυλαττέσθαι τὴν μαλαίον πραγματείαν μέχρι οὗς ἕ* *ὠφελίμῃ πάντα καὶ αὐτὸς συνεπέσχετο ἕ* *συνδίδεχθαι τοῖς συνῶσι.* Mem. lib. 4. c. 7. § 8.

Among many other^a learned and ingenious publications, with which the Ladies of this age and country have obliged the world,

^a See for instance, the translation of Epictetus, the Essay on the Writings and Genius of Shakespear, Life of Monf. D'Aubigné, and Letters on the Improvement of the Mind.

this

this excellent work of Xenophon's has, owed its naturalization in England to a female *Philosopher*; whose words I have here transcribed, as interpreters of her author's sentiments.

He was very careful to fix the bounds in every science, beyond which, he would say, no person properly instructed ought to pass.

Socrates also recommended the study of arithmetic to his friends, and assisted them, as was his custom, in tracing out the several parts of it, as far as might be useful; but here, as elsewhere, fixed bounds to their enquiries, never suffering them to run out into vain and trifling disquisitions, which could be of no advantage either to themselves or others. Mrs. Fielding's Translation, p. 350—353.

The admirers of Xenophon's account of Socrates, that have not yet met with a small tract lately published^a, will have great pleasure in seeing one of the most beautiful remains of antiquity set in a light, which had hitherto escaped every one who had published his sentiments on that excellent work;

^a Printed for Rivington, the beginning of this year.

as the learned author of the small pamphlet, called the "Socratic System of Morals," as delivered in Xenophon's Memorabilia," in endeavouring to shew not only that there is a connection throughout the Memorabilia, but even that the parts arise out of each other, and have that regular dependence on each other that forms a system, has given the learned world an idea quite new and very plausible at least, if any one should think it not absolutely satisfactory.

Page 14. line 20. *Geometry of general utility, &c.* Two things deserve to be lightly touched on in this place. 1. The application of mathematics to the art of reasoning, in which view alone it can be of general use. 2. The false taste which some writers have fallen into, by a misapplication of this kind of learning to other subjects.

As to the application of geometry and algebra to the art of reasoning, Mr. Locke, in the passages alluded to and throughout his Essay, is full enough in general, and a

late

late treatise * of logic, that copies Mr. Locke's notions, and is the most liberal on that subject, 'has been rather more explicit in this particular.

The method of reasoning has been divided by logicians into the analytic and the synthetic. And as to the bare form of reasoning, algebra furnishes the most perfect model of the analytic, as geometry does of the synthetic; as is well known to every body conversant in treatises of that kind.

I will only add, that with a view to algebra as an art of reasoning, Professor Sander-son has, with uncommon perspicuity, done great justice to the subject; and has often given excellent specimens both of the analytic and synthetic methods together. See vol. I. p. 173, and 213. &c. And if we would look abroad for the application of these methods to other subjects than that of abstract quantity, Aristotle (even on the most liberal subjects, as poetry and rhetoric) may be recommended as a pure model of the synthetic, or demonstrative method,

* By Mr. Duncan,

as Xenophon and Plato, in their Socratic Dialogues, are of the method of investigation.

The reason why algebra deserves to be so much commended as the great art of extending our enquiries, (as geometry is of communicating them) seems to be from the variety and subtlety of its operations; the most considerable of which it may not be amiss to give a summary view of in this place. And such are, 1. Its transpositions. 2. Ingenious substitutions of known for unknown quantities. 3. Assumed equality of lines and symbolical quantities, whereby in the deeper operations an elegant simplicity and conciseness of expression is obtained. 4. By adding or subtracting equations or ratios. 5. By the admirable facility its rules offer for comparing things together. 6. The independency of algebraical operations; whereas the propositions of Euclid (and all geometrical truths depending on them) are in a manner all chained together. The poet was happy in his idea when he said,

Full in the midst of Euclid dip at once,
And petrify a genius to a dunce.

Euclid is certainly one of those authors (in Seneca's phrase) in limine salutandus. 7th, and the last to be mentioned here, as a great spur to invention, and which are capable of being transferred to other enquiries, are the various means Algebra affords of coming at the same conclusions, by the union of its operations with those of Geometry. Of this Sir Isaac Newton, in his Universal Arithmetic, has given a beautiful instance, by deducing the same equation seven different ways. See the Latin edition, 8vo. p. 109—114.

So much for the real use of mathematical learning in cultivating, without cramping, the powers of the mind: but if instead of transferring the manner and perspicuity of geometrical reasoning to other subjects, other subjects are made to conform to this, the effect is inverted, and the faculties are confined instead of being enlarged. And therefore a few words must be added on the

misapplication of this excellent science.
2. And excellent as it is, one is sorry to see the pedantic misapplication of the peculiar characters of Geometry and Algebra, that has prevailed with many writers on subjects totally different; whereby morality itself has been, in a manner put into masquerade: and some of the first and clearest ideas in the mind of man have been involved in obscurity. This censure is the more necessary, because the very errors of some writers acquire a credit from their example; which it is much easier for the generality to copy than to distinguish where it ought or ought not to be copied. The dry forms of Propositions, Lemma's, Postulata, and the like, (which have been used in several instances) are of themselves disgusting in treatises of morality, even to the few who understand them in their proper places; but arguing from symbolical characters is surely much more so.

Page 15. line 7.] The passage alluded to is in the conduct of the understanding.
§ 6.

Page

DIALOGUE I. 19

Page 16. line 17.] Mr. Locke recommends the study of the first six books of Euclid. On Educat. § 171. author of Analyst, viz. Bp. Berkeley.

Page 18. line 7.] See Tully de Oratore.

Page 22. line 20. *Finch has said.*] See Finch's Law, b. I. p. 6.

Page 23. line 13. *The sage Littleton.*] The passage alluded to is in his Tenures, § 267.

Page 24. line 3. *Good old writers, Briton and Bracton, &c.*] Lord Coke has cited the passages in his 1 Inst. 11. a.

Ibid. line 13. *The exact similitude that, Lord Coke tells us, (from the Parliament Rolls) subsists between an elephant and a member of parliament, &c.*] Lord Coke mentions this in his 4 Inst. 3. The Parliament Roll he cites in his margin is Roll. 3. Hen. 6. No. 3. which may be seen at length in the Cotton Records, 577, pl. 3.

Swift, in the lively turn he has given this hint, has mentioned it as if Lord Coke himself was the author of the comparison.

“ 'Ere bribes convince you whom to chuse,
The precepts of Lord Coke peruse;
Observe an elephant, says he,
And let, like him, your member be,” &c.

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Page 26. line 10. *The accounts of the antients less fabulous.*] Sir W. Temple, as the champion of the antients against the moderns, treats those accounts as literally true, which the antients themselves considered as allegorical. See vol. i. fol. edit. p. 162. Dr. Wallis, who was himself eminently skilled in music, and in the theory of it, both antient and modern, has left a curious enquiry, in the Philosophical Transactions, (No. 243. August, 1698.) why the effects of music are supposed to have been so much greater formerly than at this day; and upon his reasoning, and every day's experience, the remark of Eunomus is grounded. In further

ther support of those observations, two instances may be added, both taken from very credible writers, of the extraordinary effect of music.

Henry Stephens, in his preface* to the edition of the Greek Poets, speaking of the story of Arion and the Dolphin, and other marvellous accounts left us by the antients in testimony of the power of music, adds an instance of his own knowledge. In the year 1550 he visited England, and during his stay there, gives an account of his going to see a Lion, which was esteemed remarkably large and fierce of the kind; mentions that a Boy being accidentally there with a Dutch organ played upon it, on which the Lion left his food, listened with great attention, and turned himself round several times, as it were dancing; as soon as the organ stopped, he returned to his meat very eagerly, but the Boy playing again he listened to the sound, and was as full of motion as before.

* Preface p. 8. The same story is materially inserted in Mattaire's Lives of the Stephens's, p. 216.

After some days the experiment was tried again, and had the same effect. This is the substance of the story. I have added it, however, in his own words, for any one who has not the book by him.

“ Arioneus quidem certè Delphin notior
 “ est quam ut eum hic commemorari ne-
 “ cessè sit. Sed hæc omnia fando audita sunt
 “ tantum : hujus autem quam narrabo rei,
 “ testem me oculatum esse profiteor. Quum
 “ Londini agerem, animum Cupido incessit
 “ visendi Leonem, cujus omnes mihi Vasti-
 “ tatem prædicabant. Fortè accidit dum
 “ ejus unà cum aliis spectator essem, ut in-
 “ grederetur Juvenis organum quoddam cir-
 “ cumferens. Is quum paulo post hortatu
 “ nostro (experiri enim libebat quàm verum
 “ esset quod de Leone ferebatur) pulsare
 “ illud cæpisset, repentè vastam illam bel-
 “ luam, relictis, quas avidè alioqui vorabat
 “ antea, carnibus, non modò attentam mu-
 “ sicorum sonorum auditricem esse, sed et
 “ in gyrum corpus circumagere, perque
 “ certos orbes ire ac redire, tanquam tripu-
 “ diantem,

“diantem, non sine stupore conspeximus.
 “Pulsare organum ille definebat? ad car-
 “nes hic suas redibat. Ad pulsandum orga-
 “num ille revertebatur? Missas carnes hic
 “faciebat, suamque tripudiationem iterum
 “incæptabat. Nec vero hoc tum aliquoties
 “experiri satis visum est; sed et aliquot
 “post diebus eò reversi iterum experiri
 “voluimus: et experti certè sumus sed mi-
 “nore tamen cum admiratione quòd tunc
 “in vorandis carnibus occupatus minimè
 “esset. Eant nunc qui ea quæ de Orphei
 “lyrà poetæ scripserunt, mera mendacia
 “esse clamant.”

The other instance is of a surprizing effect
 of Music, on the human species, and even in
 Italy, where it is so universally familiar, and
 as it were of the growth of the Country, as
 that it rather adds to the account. It is an
 extract from Sig. Tartini's Trattato di Mu-
 sica, inserted in Mr. Stillingfleet's Essay on
 the Principles and Power of Harmony.

“In the year 1714 (If I am not mistaken)
 “in an Opera that was performed at An-

"sona, there was in the begining of the
 "third act, a passage of recitative, unac-
 "companied by any other instrument but
 "the base : which raised both in the Pro-
 "fessors and in the rest of the audience,
 "such and so great a commotion of mind,
 "that we could not help staring at one
 "another, on account of the visible change
 "of colour that was caused in every ones
 "countenance. The effect was not of the
 "plaintive kind : I remember well that the
 "words expressed indignation ; but of so
 "harsh and chilling a nature that the mind
 "was disordered * by it. Thirteen times
 "this drama was performed, and the same
 "effect always followed, and that too uni-
 "versally ; of which the remarkable pre-
 "vious silence of the audience, to prepare
 "themselves for the enjoyment of the ef-
 "fect, was an undoubted sign." *Stillington*,
fleet, p. 62.

* This was, in effect, a species of that *Anti-Music*,
 which Lord Bacon had long before conceived as a very
 practicable invention.

Page 28. line last. *Many of the antient laws of Greece are preserved in both his poems.]*

The Grecian antiquities of Archbishop Potter, Meursius, and Petit's *Leges Atticæ*, are full proofs of this; and see an ingenious dissertation to this purpose in Gronovius, *Collection of Greek Antiquities*, Vol. vi.

Page 29. line 15. *Appeal to the many eminent writers of natural and civil law.]* One may in this case appeal to the Roman Emperor himself, who has quoted Homer in his *Institute*; as the compilers of the *Digest* had done before him. See particularly *Inst.* 2. tit. 7. on the *Donatio Causâ Mortis*, and the *Digest*, lib. 1. tit. 1. § 1.

Page 33. line 1.] *Odyss. l. 1.*
 Their Manners noted, and their States surveyed,
 Pope, v. 6.

Ibid. line 12. *Must be qualified to improve by travel.]* Dr. Middleton's remark on Tully to this purpose is very fine. See his *Life of Cicero*, Vol. i. 4to. edit. p. 45, 46.

Page 35. line 6. *The orators of Greece and Rome are qualified as well as the poets to entertain in their turn; the poets, we are told, were their fathers.*] Alluding to a passage in Strabo, well worth transcribing.

Ὡς δ' εἰπὺν ὁ πεζὸς λόγος οὐ κατεσκευασμένος
μιμημα τῷ ποιητικῷ εἰν· πρῶτισα γὰρ ἡ ποιητικὴ
κατεσκευη παρῆλθεν εἰς τὸ μέσον, καὶ εὐδοκίμησεν,
εἰς αὐτὴν μίμνεσθαι, λυσάντες τὸ μέτρον, τ' ἄλλα
δὲ φυλαξάντες τὰ ποιητικά, συνεγράψαν οἱ περὶ
Καδμὸν καὶ Φερεκύδην, καὶ Ἐκλείον. εἰτα οἱ ὑπερὺν
ἀφαιρύντες αἰετὶ τῶν τοιούτων, εἰς τὸ νῦν εἶδος
κατήγαγον ὡς ἀπὸ ὑψὸς τινος.

Edit. Casaub. lib. i. p. 18.

For, if I may so express myself, prose composition, where the diction is studied, is an imitation of poetry; for poetic ornaments appeared first in the world, and met with approbation: in imitation of which, writers in succeeding
times,

* Casaubon, and other editors of Strabo, translate the original “οἱ περὶ Καδμὸν, &c.” simply Cadmus,
Pherecydes,

times, were induced to drop the metre in their compositions, but at the same time to preserve other poetic ornaments. And at length, those who came last, by continually subtracting something, brought it down to what we now see it from its original elevation.

This historical conjecture of Strabo may serve as a basis for the observation in the Introductory Essay, p. 8, and is alluded to in the second Dialogue, where poetry is

Pherecydēs, &c. and there are many instances in the best authors, where the word *περι*, contrary to the general import of the term, means the person himself connected with the preposition; as *οι περι Σωκρατην*, *οι περι Αλεξανδρον*, are used to denote Socrates and Alexander: but even in these instances, I take it, the word *περι* always implies something more; that is, as we may say, Socrates and those *about* him, or Alexander and those *about* him, viz. the scholars of the one, the soldiers or attendants of the other. All which seems evident from the instances of this use of the word, collected by H. Stephens, in his Greek Thesaurus, voce *περι* cum accusativo. However, precision not being so necessary on the present occasion, the general manner of translating the passage above seemed sufficient,

said "to have been the original form of all writing." Page 18.

Page 36. line 8. *Who is there, tho' he knows them to be fictions, tho' in the severe eye of criticism they are so many violations of historical truth.*] This is Mr. Voltaire's opinion, who insists upon it such fictions are excusable only in writers of antiquity. "Les harangues sont une autre espece de mensonge oratoire que les historiens se sont permis autrefois. On faisait dire a ses heros se qu'ils auraient pu dire. Cette liberte surtout pouvait se prendre avec un personnage d'un tems eloignee: mais aujourd'hui ces fictions ne sont plus tolerées." Preface to Hist. Russ. p. 38. And it may be remarked, Lord Lyttelton, whose example and authority will always have great weight, has not given this fiction a greater latitude, in his admission of them into the History of Hen. II. because his hero, with respect to our days, is *d'un tems eloignee*. And on this principle he seems to vindicate them.

them. Notes, Vol. i. p. 522. to the History, Vol. i. p. 398. And from very rude materials, authentic however in point of foundation, has work'd up some animated pieces both of military and civil eloquence.

Page 43. line 17. *Appeal to the present.*] viz. the year 1767, when the dialogue was written.

Page 46. line 11. *The figure they have made in the senate.*] Always except in 6 Hen. VI. when lawyers were expressly excluded; and that period, we know, is characterised by the name of "Indoctum Parliamentum." See 4 Inst. 48. Mr. Hume, indeed, says, "Lawyers were totally excluded the house during several parliaments, in Edward the Third's time;" and cites Cotton's Abridgment, p. 18. but the page cited does not warrant the assertion, there being some mistake in the figures. Hume's Hist. Vol. II. p. 233, 4to.

Page 48. line 17. *Histories of Hen. VII. and the civil war.*] At the time of writing the Dialogue, these great works were singled out, if not as models, yet as the best specimens we have of English history, and the voice of the world seemed then to be in their favour. A passage, however, from a work since published, will shew it is not an universal opinion.—

“ Let me lament that two of the greatest
“ men in our annals have prostituted their
“ admirable pens, the one to blacken a great
“ prince, the other to varnish a pityful tyrant.
“ I mean the two Chancellors, Sir Thomas
“ *More* and Lord *Bacon*. It is unfortunate
“ that another great chancellor should have
“ written a history with the same propensity
“ to misrepresentation, I mean Lord *Clarendon*.
“ It is hoped *no more Chancellors* will
“ write our story, till they can divest themselves
“ of that habit of their profession,
“ apologizing for a bad cause.”—It is hoped,
however, *no more writers*, who may chuse to
publish their *historic dotings*, will think they
alone have force enough to shake the long-
established

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established opinion of the world on the merit of the greatest authors; at least, when they are thus deciding on the works of the Writer, they will spare themselves the trouble of going out of the way to abuse his *Profession*, with which and the work in question there does not seem to be any kind of connection!

Page 51. line 7. *Kill him first, and then, after the manner of the Egyptians, scrutinize his conduct.*] See a law to this purpose in Diodorus Siculus.

Page 54. line 4. *Compare similar events.*] With this view writers of the most liberal turn have now and then disregarded even large anticipations in chronology, in order to instruct the better, by comparing similar characters, actions, or manners, of different ages.—As in the reign of Hen. II. Vol. i. p. 289, 421. and Vol. ii. p. 162, 246, 284, 339. This liberty is very frequently to be

met

met with in the Memoirs of Brandenbourg,
and Voltaire's Essai sur l'Histoire.

Page 54. line 22. *The practice of different nations, in points that are indifferent in themselves, and not of natural obligation, have been considered as the law of nations.* Bynkerhoek, a very sensible writer, in his Jus Publicum, attends much to this distinction.

Page 55. line last. *The number of examples in History, will not create Law in this respect, and this difference must be attended to, or History will mislead Reason by false colours.* This subject has been considered in a more general view by a celebrated French writer, the Chancellor d'Aguesseau, whose observations, it is hoped, will not be thought improperly cited here, pretty much at length, being on a very interesting point, forcibly expressed, and taken from a work comparatively in very few hands. Concluding his instructions

instructions to his son on the study of his-
 tory, he says — “ Vous êtes a portée par
 “ ces reflexions generales de connoître les
 “ avantages d’une etude si necessaire, et j’es-
 “ pere que vous en eviterez de vous meme les
 “ inconvenients. Vous les sentirez aisement
 “ pour peu que vous fréquentiez ceux qui se
 “ sont tellement attachés a cette etude, qu’ils
 “ ont negligé toutes les autres. Ils tombent
 “ dans un excès directement opposé a celui
 “ des esprits qui ne font cas que de la Philo-
 “ sophie. Ceux-ci veulent juger de ce qui s’est
 “ fait, par ce que doit se faire ; et ceux-la
 “ veulent toujours décider de ce que doit se
 “ faire par ce que se fait. Les uns sont, si
 “ je l’ose dire, la dupe des raisonnements, et
 “ les autres le sont des faits qu’ils prennent
 “ pour la raison meme. Leur esprit devient
 “ tellement historique, qu’ils ne sont presque
 “ plus capables de raisonner par principes.
 “ S’agit-il de former un jugement, ils racon-
 “ tent un fait, et au lieu de la decision que
 “ vous leur demandez, ils vous donnent une
 “ Histoire et souvent un Conte ; enforté que
 VOL. IV. D “ contents

“ contents de pouvoir repeter beaucoup de
“ faits, et ne travaillant qu'a enrichir leur
“ memoire, ils semblent n'être plus que des
“ Dictionnaires animés, et des Repertoires
“ parlants.

“ Comme il n'y a presque point des matiere
“ sur laquelle on ne trouve des faits ou des
“ exemples contraires, et qu'ils negligent
“ l'etude des principes qui apprennent l'usage
“ qu'on doit en faire; il ne resulte souvent
“ de tout leur sçavoir, q'une confusion et
“ une indecision universelle, parce que les
“ faits se combattent, pour ainsi dire, dans
“ leur tête, ou ils ne produisent que des
“ doutes, et ne forment que des nuages.

“ Enfin, si le Ciel leur a fait le dangereux
“ présent d'une trop heureuse mémoire c'est
“ un miroir où tout se peint en detail, et
“ jusque aux moindres objets. Le superflu et
“ le frivole prennent la place de l'essentiel et
“ du solide, ou du moins le chargent et l'of-
“ fusquent tellement, qu'il faut traverser une
“ mer de bagatelles, pour arriver jusqu'à la
“ terre ferme.

“ — Les

“ — Les principes que vous avez déjà
 “ imprimés dans votre esprit, mon cher Fils,
 “ et ceux que vous y ajouterez dans la suite,
 “ me font espérer que vous ne tomberez pas
 “ dans ces défauts : vous ne séparerez point
 “ deux choses qui doivent toujours marcher
 “ de concert, et se prêter un secours mutuel
 “ *la Raison et l'Exemple*. Vous éviterez égale-
 “ ment et le mépris des Philosophes pour la
 “ Science des faits, et le dégoût ou l'incapa-
 “ cité que ceux qui ne s'attachent qu'aux
 “ faits contractent souvent pour tout ce qui
 “ est de pur raisonnement. Ainsi, pour finir
 “ par où j'ai commencé, sachant réunir et
 “ vous approprier les avantages de deux Sci-
 “ encés également nécessaires à l'homme pu-
 “ blic, la vraie et solide Philosophie dirigera
 “ chez vous l'étude de l'Histoire, et l'étude
 “ de l'Histoire perfectionnera la Philoso-
 “ phie.”

Oeuvres d'Aguesseau, tom. i. p. 340.

Page 56. line 6. *Natural connection be-
 tween law and fact.*] This connection, to
 those that trace it in the mind, will be al-

ways found to form a compleat syllogism. And the syllogistic process of a man's own conscience, as well as that of human judicatures, the sentence of both being no other than that conclusion which the mind must draw from a comparison of the general rule, (that is, either the dictates of natural reason, the laws of society, or express positive revelation) with the action or case supposed, is insisted on by many excellent writers; and indeed affords the finest theory of religious and moral duty, as well as of political justice. In this view see Dr. South's Sermons, Vol. II. p. 492. Heineccius de Jure Nat. et Gentium, lib. i. c. 2. § 34. Burlamaqui, partie second c. 9. § 2. And the Third Commentary on the Laws of England, p. 396. The present Czarina has treated this in the same manner, Instruct. pour le code de la Russie, Art. 10. par. 142. and the Marquis de Beccaria, c. 4, p. 14. whom indeed the Empress evidently copies, because they both concur in the singular notion of taking from the Judge the power of

of interpreting Criminal Laws, notwithstanding his decision on those Laws implies it: for how can he draw that conclusion which is the result of the comparison of the Law with the Fact, if he does not know the precise meaning of the Law itself? How, in other words, can he conclude without premisses; for when the Law is in doubt, the major proposition of the Syllogism is evidently defective? If indeed the Prince is to explain Law by a new one in every instance, what kind of fence will such Laws be?

Page 57. line 15. *The annales pontificum the early form of history.*] Mentioned in the same passage in Tully de Oratore, as the passage above cited, page 48.

Page 61. line 12. *The little finger of the law was heavier than the loins of the prerogative.*] Alluding to a remarkable and fatal saying of Lord Strafford's, taken notice of in Lord Clarendon's History, Book II, p. 174. Oxford edition.

Page 62. line 2. *That the Laws of England are the King's laws, &c.*] See the printed argument, and the Chief J. (Sir Ed. Herbert's) opinion in *Godwin v. Hales*. Trin. 2 Ja. page 11. And *State Trials*, Vol. vii. fol. 616. In what sense they may be called so, see Dial. 3. p. 129,

Page 63. line 5. *Of opinion that it is treason in a parliament to proceed on any business contrary to what the King may appoint.*] See Mr. J. Foster's Discourses, p. 395, 396. where the whole proceeding is considered.

Page 64. line 6. *And yet this every man, says a very honest and learned Judge, &c.*] J. Foster. See the case itself alluded to in the Dialogue, reported in *Dyer* 100, and Foster refuting *Dyer*, Disc. 234.

Ibid. line 14. *Setting one Judge to tamper with all the rest.*] See many instances of this tampering, Foster, *ibid.* 200. To which may be added, the remarkable case of the
Ship.

ship-money, in which Lord Keeper Finch tampered with all the Judges. See for this purpose Rushworth's Collec. part 3. p. 87. Lord Falkland's Speech on it, and the Vote, Ibid. 129.

Nor was this tampering with Judges, however unconstitutional, at all inconsistent with the principles of some reigns. It is no hard opinion, because it is a conclusion from facts, to say that the prerogative has, in distant times, been more regarded than the rights of the subject, even in the very choice and appointment of Judges; witness Lord Bacon's Letters, lately published by Dr. Birch, p. 42, 44, 97, 103.

That collection shews likewise, that it was a common practice for noblemen in that age to write to a Chancellor, during a cause depending, in recommendation of one of the parties; which practice was doubtless such an attack on the impartiality of justice, that an age of more freedom in other respects would blush at; a singular example indeed of Tully's observation — *non eru-*

beside Epistola 1. In these letters however was usually inserted a colourable restriction to the request, "to grant as much favour as the justness of the cause would permit;" which no doubt was understood by the writer to be as much a word of course, as *the clause of equity* every suitor puts into his own bill. And yet the practice appeared so defensible at that time, that Lord Bacon, even after his disgrace, fell into it as others did. See the above letters, p. 168, 173, 377, &c. &c. I omit other corruptions in judicial proceedings, more gross and glaring than these, in the same collection, even without a reference; because I have no pleasure in dwelling on circumstances that so much degrade the dignity of human nature; and the only comfort that can ever arise in contemplating such instances, even at this distance, is, that the present times are in this respect the strongest contrast to the former.

Page 65. line 10. *To the immortal honour of our present Sovereign.*] See the Act 1 Geo.

Geor. 3. c. 23. And more to his honour; because it seems a bill of this kind was offered in the year 1692. and refused the royal assent.

"2 Burnet Hist. 86. to which possibly Addison alludes as a measure then in agitation. Guardian, No. 99. though I rather consider that passage as it may be explained from the anecdote preserved by Lord Raymond, vol. ii. 768.

Page 66. line 3. *What Chief Justice Vaughan said.*] So said in the case of Harrison and Dr. Burwell. 2 Ventr. 10.

Page 68. line 18. *The trial of a private recusant.*] Sir J. Hale's coachman in King James 2. time; of which the Histories and Law-books are full.

Page 71. line 1. *Self-defence must subsist in those cases, where the laws of the community cannot be appealed to.*] Alluding to the true distinction in the well-known passage of Tully pro Milone. On this principle our law

law allows persons to abate nuisances, in cases of necessity; as pulling down houses to stop fire; killing fugitive felons. 2 Hale, 77. And in regard to personal defence, it may be observed, the plea of *son assault démeine* (as it is called) in actions, is grounded on this great law of nature. The same will in evidence acquit or excuse in all cases on indictments; but then (as it has been supposed all along) the necessity of the self-defence must appear in all cases of that nature: for no man is to take his own remedy, where the law can be applied to. (401. VOL.)

To the universality however of this doctrine, one exception it seems must be understood, if indeed it is true, that a person who is "struck in a church-yard cannot justify striking again in his own defence." 102

It is indeed so laid down by Hawkins, 1 Pl. Coron. 139. and he cites Cro. Jac. 367. as his authority. The opinion itself, however copied from one book into another, is enough to startle every body: and it is but justice to a point of such importance to consider it minutely.

And if the opinion stands upon that authority, it will, I apprehend, deserve very little weight, for the following reasons :

1. Because that book, in the place cited by Hawkins, contains only a string of resolutions, without so much as one circumstance of fact being reported in the case, to shew what points were before the court ; and consequently to discover, whether this point was or was not extrajudicially determined? Noy, indeed, though not cited by Hawkins, seems to report the same case ; (Noy, 104) at least the points resolved are the same, though the name of the case is different. It does not however appear, even from his state of it, that " the fact at all led to the determination." It was, according to Noy, a Bill in the Star-chamber for pulling down of painted glass, pictures, and arms in a window, in an isle of a chapel in Somersetshire. And this reporter is more particular than J. Crook, as to the resolution of this point. " A man may not beat another, or draw a weapon there, although it

in be in his own defence; for it is a sanctified place, and he may be punished for that by the Stat. of 2 Ed. 6. And so if in any of the King's courts, or within view of the courts of justice: because a force in that case is not justifiable, though in his own defence."—Now it may be observed from this state of the resolution, ¹¹⁰ That the fact "of beating in his own defence," from this state of it, does not appear to have been before the court; rather the contrary; for it says only "he may be punished by the statute," and therefore the statute was hardly then before the court. ²¹ It is compared to "striking in courts of justice, or within view of the courts." Now I do not find, upon looking into the books, that it had been ever held at or before that time, that self-defence in this latter case was not justifiable. In Trin. 15. Car. 2. Justice Twissden held (not improbably from this notion in Noy) that the party struck could not justify striking again. ¹¹⁰ Lev. 106. ¹¹⁰ The authority of that case is (I own) stronger: ¹¹⁰ because

because the fact arose in the case: but even in that case, the opinion was premature, though not extrajudicial; because it was so said by the judge at the time of the defendant's entering into the recognizance; now it could be material only at the time of the trial. According to the report, the defendant was convicted at his trial; but whether self-defence was set up in excuse, or whether it was then over-ruled by all the judges at the bar, does not appear.

But allowing this case all the authority any case need have, surely striking in a church-yard is very different in its circumstances from striking in view of the courts, especially as the courts then were unenclosed and more open to view: and consequently the reasoning from one to the other by no means just. One is in the church-yard generally without restraining it to time of divine service; where the insult and indecency would be greatest, and the necessity of self-defence (which alone is to excuse it at any time) would be the least: because there

might

might be people enough present to seize the affrayer. The penalty of striking in Westminster-Hall, or in view of the courts, is restrained "to the courts sitting *," where perhaps self-defence may be less necessary than in any case whatever; because the party offending may be immediately seized and carried to justice, as the fact was in the case, 1 Lev. 106. But what chance may the party have for his life in a solitary country church-yard?

2. Because his opinion (not being supported by the case cited) will have very little weight in itself: because the words of the act 5 & 6 Ed. 6. c. 4. creating the offence, are not strong enough to repeal a primary law of nature, as self-defence is; and it is contrary to the general tenor of constructions to repeal common law by any act that is affirmative only.

3. Because such an opinion may be attended with consequences the law would never endure. — A man (if this opinion

* Cro. Car. 373. Sir William Waller's Case.

holds)

holds) must even submit to be murdered in a church-yard, when a slight resistance on his side might have saved his life: and for want of self-defence in such a case, two lives in the end must be sacrificed, where both might have been preserved.

I could not help adding such reflections as occurred to me, upon looking into the original authority on which the opinion is grounded; because the opinion, untenable as it seems to be, has crept into many books of credit; and may acquire an authority in being echoed by each subsequent writer, however weak and sandy the foundation may be on which it originally rests. It has made its way from Hawkins into Watson, and other subsequent writers.

Page 71. line 18. *On this principle Mr. Locke vindicated the Revolution.*] See his Book on Government, sections 151, 155, 209, 210.

Page 73. line 14. *To use the expression of a great advocate for civil liberty.*] See Foster's Disc. 404. and the Remarks on English History, letter 20.

Ibid. line 16. *Addison.*] Spect. Vol. vii. No. 403.

Page 75. line 1. *Many writers rank the piratic states of Barbary.*] See Molloy de Jure Marit. 53. 136, 17. and this question more humanely determined in Bynkershoek. Jus Public. 121. b. 1. c. 17.

The same, line 3. *Mr. Locke does all absolute monarchy.*] On Government, sect. 90.

Page 77. line 14. *Bracton, who was a doctor of both laws.*] Foster's Disc. p. 132. and Spelman's Remains, 99.

Page 78. line 3. *The attempts of Cowell.*] Both houses concurred in a resolution

tion to censure Dr. Cowell's other book, written in 1609, called "The Interpreter," as containing many heads derogatory from the Parliament and the Constitution: but the King promising to take the matter up, their proceedings dropped. See Journ. Dom. Proc. et Com. 7 Ja. cited Petyt's Miscell. Parliamentaria, p. 64. Lord Coke's observation in his Preface to the 10th Report, will serve to all such books. The titles censured were *Subsidy, Parliament, King, Prohibition, &c.* See the printed Journals of the Commons, Friday 23 Feb. 1609, Vol. i. p. 399. The edition of Cowell's Interpreter in 4to. of 1637, is accordingly considerably purged, but will be found to have errors enough left to discredit it as a constitutional authority.

Ibid. line 11. *That King preferred the Civil, &c.*] In Wilson's Hist. of King James, 46, 47.

Page 79. line 2. *Lord Bacon proposed.*] See his proposals printed in all the editions of his works.

Ibid. line 5. *Civil Law however deserves to be studied.*] It is scarce possible to mention a more constitutional lawyer than Lord Chief Justice Hale; and his opinion of the civil law may be seen in Bp. Burnet's Life of him, page 24.

Ibid. line 16. *Agrees with the Civil Law in many particulars.*] It was thought unnecessary to cite passages even here; as books of authority, both in our own and the civil law, may easily be turned to, in support of what is said in the Dialogue. In particular, Wood's Institute of the Civil Law; and above all, the Commentaries on the Law of England, will on this point give the curious enquirer the satisfaction he desires.

Page 80. line 7. *The difference of the two systems in similar objects.*] In this place

it

It may not be amiss to be a little particular, because the track is new and not without its convenience. Many Cases might be collected from our Law books, where our courts have followed the civil law: and many where they expressly differ. Some of both which are here referred to.

1. Cases where the civil law was followed, as 1 Peer Will. 10. Ibid. 267. Ibid. 304. Ibid. 405, 6. Ibid. 441, 442. 2 Tr. Atkins, 115. 3 Tr. Atk. 364. S. C. Wilson, 135. Comyns, 738. 1. Vezey, 86. 107. &c. &c.

2. Cases where they expressly differ. 2 Peer Will. 142, 143, 348, (529) 442, 528, 530, (628) 667, 682. 2 Hawk. P. C. 13. § 10. 1 Strange, 80. 2 Strange, 1255. 2 Vezey, 517. &c. &c.

Page 81. line 3. *Extraordinary refinement.*] This extraordinary law is to be met with in the Code, l. 5. tit. 3. law. 16.

Page 81. line 14. *Not altogether a stranger to the Roman law.*] Sir H. Spelman, in his corrected copy of the Treatise on Terms, has omitted a strong assertion to the contrary, contained in his first copy, published separately, 1684. and so indeed has Fortescue, lib. 1. c. 17.

Ibid. line 17. *Discovery of part of it.*] That is, Justinian's Pandects at Amalfia, in the territory of Naples. See Giannoni Istoria Civile di Napoli, tom. 2. lib. 11. c. 2. Spelman, Duck de usu, &c. and other writers.

Page 83. line 4. *Sir Hen. Spelman will tell you.*] Reliq. edit. Gibson, 89, 98.

Ibid. line 15. *Lord Vaughan.*] Who is reported to have said so. 2 Ventris, 11.

Ibid. line last. *Many questions.*] Alluding to numbers of questions well known in our law books; most of which are recognized

cognized in the argument and resolution of Robinson and Bland, reported by Sir James Burrows.

Page 85. line 13. *An English Lawyer has his Lombard School.*] Besides what our own writers have said on the Law of Lombardy, many particulars are to be met with in Giannoni's *Istoria civile di Napoli*, tom. 1. lib. 5. c. 5.

Page 86. line 5. *Learned and unexceptionable Witnesses.*] By the names of Spelman, Hale, Wright, and particularly the Author of the Commentaries.

Ibid. 86. line 15. *Invasions, most of them productive of laws.*] Spelm. Reliq. 100. Fortesc. 17. and Bacon's proposals for a Digest.

Page 87. line 5. *Political maxims of other States adopted.*] The Legislature itself has, in one memorable instance, built its pream-

ble on the observations of our nobility who have travelled. 36. Ed. 3. c. 15. "In divers regions and countries, where the King, the nobles, and other of the said realm, have been, good government and full right is done to every person, because that their laws and customs be learned, and used the tongue of the country," &c.

Page 88. line 9. *Grecian artists expressed themselves in a mode of language implying imperfection.*] See Plinii Nat. Hist. Exord. § 10. or Mr. Harris's *Hermes*, p. 137.

Page 89. line 17. *Helen of Zeuxis.*] Mentioned in Tully's book, called *Orator*, c. 6. See the same allusion *Xen. Memorab.* lib. 3. c. 10. § 2.

Page 90. line 12. *Sex horas somno of your master Coke.*] Alluding to Lord Coke's advice to the student, in his *Comment on Littleton*. Co. Litt. 64. b.

Page 90. line 10. Homer, *Iliad* 2.

Page 90. line 10. Homer, *Iliad* 2.

"No Counsellor must waste whole nights in sleep,"

Is the sense in a single line; Mr. Pope has paraphrased it.

"the tongue of the country," &c.

Page 88. line 10. Green's *Art of Rhetoric* expressed in a more simple mode of language, implying improvement. See *Philosophy of Language* (Exord.) § 10. or Mr. Harris's *Homers*, p. 137.

Page 80. line 10. Mentioned in Tully's book, called *Orator*, c. 6. See the same allusion Xen. *Memoirs*, lib. 3. c. 10. § 2.

Page 90. line 10. See *Baron's* *Journal of your master Coke*. Alluding to Lord Coke's advice to the student, in his *Comment on Littleton*, Co. Litt. d. 4. b.

NOTES

DIALOGUE II.

PAGE 4. line 4. *Olive grove of Academe.*] Alluding to Milton's *Paradise Regained*, b. 4. v. 244.

Ibid. line 12. *Even by a friend of Plato's.*] Cic de Oratore, lib. 1. c. 7. and in the introduct. to his Book de Legibus, lib. 1.

Page 8. line 7. *As Virgil's Fame.*] See *Æn.* III, v. 128. Tot vigiles oculi, &c.

Page 8. line 8. *Different languages our laws are composed in.*] See, among others,

Preface

Preface to Sir J. Davis's Report, fol. 6, 7.
and see Preface to 3d Report.

Page 13. line 17. *Latin language employed
by all civilized nations in law proceedings.]*
See Duck. de us. Jur. Civilis, lib. 2. c. 1.
p. 110, 111.

Page 18. line 10. *Not only records, but
charters and wills have been written in
verse, &c.]* See the Record of the law-
less court in Camden's Britannia, edit.
Gibb. 341. but more fully in Cowell's
Interpreter, voce "Lawless court." And
a record of the Exchequer, Camd. Brit.
344. in Easter. 2 Anno. 17 Will. 1.
See the grant to the Hopton's Blount's
Tenures, 102. Various customs of ma-
nors in verse. And see 2 Lord Lytt.
Hist. 321. and 3 vol. 12. Ibid. 144, 162.
And for wills, besides Saxon instances,
there is a late and very remarkable one of
Mr. Hedges, entered in the Commons in
1737, which is as follows.

THE

THE fifth day of May
 Being airy and gay
 And to hÿp not inclin'd
 But of vigorous mind
 And my body in health
 I'll dispose of my wealth
 And all I'm to leave
 On this side the grave
 To some one or other
 And I think to my brother
 Because I foresaw
 That my breth'ren in law
 If I did not take care
 Would come in for their share
 Which I no wise intended
 Till their manners are mended
 And of that God knows there's no sign
 I do therefore injoin
 And do strictly command
 Of which witness my hand
 That nought I have got
 Be brought into hotch-pot
 But I give and devise
 As much as in me lies

To

To the son of my mother
 My own dear brother
 To have and to hold
 All my silver and gold
 As the affectionate pledges
 Of his brother JOHN HEDGES.

The testator died in 1735. This extraordinary will passed a very considerable personal estate; and may be seen, verbatim as above, in the Register, at the Prerogative Office: where it appears, that administration, with the will annexed, was granted to Paul Whichcote, Esq; and another.

Page 18. line 11. *Embassies have been delivered in verse.*] And in Latin verse too; witness that of Philip the second of Spain, and Queen Elizabeth's very spirited extempore reply.

*Te veto ne pergas bello defendere Belgas :
 Quæ Dracus eripuit, nunc restituantur oportet
 Quæ Pater evertit, jubeo te condere cellas :
 Religio Papæ fac restituatur ad unguem.*

To which it is said the Queen instantly answered,

Ad Græcas, bone Rex, fient mandata Calendas.

See Catal. of Royal authors; vol. i. p. 38.

Page 18. line 20. *Aristotle tells you.*] In his Problems, § 19. Probl. 28. and Hor. Art. Poet. v. 399. And Stanyan's Grecian Hist. Vol. i. p. 29.

Ibid. line last. *Tacitus.*] De Mor. Germ. § 2.

Page 20. line 15. *Noble regulation of our societies.*] See the order of the Inns of Court in Trin. Term, 1762.

Ibid. line 20. *Inns of court have been stiled universities.*] By Fortescue, in his Laud. Legum Angliæ, and the Preface to Lord Coke's 3d Report.

Page 23. line 6. *Sir Thomas More's question.*] See the Life of Sir Thomas More,

DIALOGUE II. 61

More, by his great Grandson (Hearne's Collection) cap. 3. and the other Lives of him, by Dr. Stapleton and Hoddesden.

Page 25. line 4. *Lord Coke's expression.*] In his preface to the first Institute.

Page 27. line 8. *What we have done as to painting and music from Italy.*] See Mr. Harris's Hermes, page 408, &c.

Ibid. line 19. *As Sir W. Temple observes.*] Scil. Introduction to the History of England, Vol. i. fol. 530.

Page 28. line 7. *Roman law.*] See Dr. Taylor's Elements of the Civil Law, and Duck de usu Juris Civil. lib. 2. p. 107—109.

Page 29. line last. *Contributed to have fixed the language.*] See Swift's Letter to Lord Oxford, Vol. iii. edit. Hawkesworth, P. 337.

Page

62 NOTES ON D

Page 31. line 19. *A great part of the lands in possession of the church.]* See Lord Coke's 2 Instit. page 3. and Sir W. Temp. Introduct. to the Hist. of England; and see note to page 86. line 13.

Page 32. line 15. *The conqueror used the utmost zeal to propagate the Norman tongue.]* See Sir W. Temp. Introduct. page 238, 241, 244. 8vo. edition; and Fortescue de Laud. Leg. Angl. c. 48. Lord Hale's Hist. of the Com. Law, c. 5. And see Observations on the Antient Statutes, second edit. p. 46. 209. And Lord Lyttl. Vol. ii. p. 320. who has shewed that even in the reign of Edward the Confessor, French was spoken by most of the English nobility; and the Norman forms were used in legal proceedings.

Page 33. line 4. *From the time of Edw. III.]* See Preface to the third Report, and Lord Hale's Hist. Common Law.

Page 33. line 19. *An ordinance well considered at the time.*] See Sir B. Whitlock's Speech in his Memoirs, p. 460.

Page 35. line 13, and the following. *Homo stands for a woman, &c.*] *Homo*, as a term descriptive of the genus or species, necessarily includes females: and in that sense it is applied in 2 Peer Will. 357, and other cases: and indeed by all writers whatever, as well as in common language. But I believe it is very uncommon to find it applied to a female, spoken of as an individual. One instance, however, occurs in the celebrated Letter of Sulpicius to Tully, on the loss of his daughter—"paucis post annis ei tamen moriendum fuit, quoniam *Homo* nata fuit"—speaking of Tullia, lib. 4. epist. 17.

Mulier is applied in our law books for a child (of whatever sex) born in lawful wedlock; whence the common distinction—Bastard eigne and *Mulier* puisne. 1 Inst. 244. and 1 Roll. Abrid. 624. and Παῖς υἱός

in

in a high sense is once used in scripture to denote *men* in a state of extreme purity and innocence. Rev. xiv. 4.

Persons to be born, to mean those already born, as 1 Will. 426. Persons living, to mean those not born, 1 Will. 342. King for Queen, as in all acts of parliament. One particle for another, in many cases in Peer Williams.

Page 36. line 4. *Patriarch of Venice did by a word of Aristotle's.* See Bayle's Dict. voce "Barbaro."

Ibid. line 12. *St. Evona, a famous Lawyer of this country.*] The story here dressed up is told in substance in a small book, published in 1691, called a Description of the Netherlands, p. 58.

Page 41. line 15. *and the following page.*] The popular objection to this part of the Law, is put by way of parody on the form itself, and p. 66. the objection is taken from

the

the common well known language of the particular forms alluded to.

Page 43. line 13. *Lord Coke one of its ablest advocates.*] He often argues from the "usual pleading," which, he says, is the *sure oracle* of law, 2 Co. 68. a. Ibid. 54. a. 3 Co. 9. a. Ibid. 27. a. and calls good pleading the *Lapis Lydius*, or Touchstone of the true Sense and Knowledge of the Common Law, 10 Co. 29. b.

Ibid. line 17. *Lord Coke often censures impertinent pleading.*] And Lord Hale. Hist. Com. Law, 173, &c.

Page 44. line 1. *An address in parliament against special pleading itself.*] In 3 Geo. II. See the Journals of the House of Commons, 11 Feb. 1730. and 13 Feb. afterwards, the same session.

Page 45. line 7. *In the Turkish dominions.*] See instances in Maundrel's and Norden's Travels.

Page 45. line 12. *Elaborate forms among the Greeks and Romans.*] See Brissonius, and the authors collected by Grævius and Gronovius. The passage from Tully, cited as the motto to this dialogue, would alone be a proof of the use the latter made of forms, if there were no remains of the forms themselves.

Page 46. line 8. *The nature of the certainty the law requires.*] Besides what is said in particular in the note to p. 45, &c. the several kinds of legal certainty, and how far the want of them may, or may not, be supplied by judicial construction, are laid down, 5 Co. 121. a. and 8 Co. 57. a. Ibid. 159. a.

Ibid. line 16. *Law requires less exactness in a will.*] See 6 Co. 64. b.

Page 47. line 19. *Deeds that are informal.*] See the opinion of Ch. J. Holt, and Mr. J. Powel. 1 Will. 76. &c.

DIALOGUE II. 67

Page 48. line 1. *Will not permit trifling exceptions to avoid deeds.]* See 1 Will. 149. and 10 Co. 126. a. Ibid. 133. a.

Page 49. line 1. *Lord Coke has told us, &c.]* See 6 Co. 66, 67. a. and 5 Co. 38. b.

Page 52. line 12. *Leibnitz, who would have deduced.]* See Mr. Locke's Conduct of the Understanding, and his Essay, b. IV. c. 7. § 11.

Page 55. line 14. *In Prior's language.]* In his Alma, 1. Canto, ad finem.

Page 56. line 14. *Jamaica or any other part of the world said in a declaration to be in Middlesex.]* See to this point Co. Litt. 261. Latch 4, 5. 2 Keb. 315. 2 Salk. 657. S. C. 6. Mod. 194. Ibid. 228.

Ibid. line 19. *Incurring pramunires.]* This expression, though in frequent use, is of

so dark and remote an application, that it deserves a few words by way of explanation in this place. At this day "*incurting a præmunire*," is a figurative expression; and means that a person guilty of any particular offence, that the law now deems a præmunire, shall suffer the same pains and penalties that persons under a præmunire (as it is corruptly called for præmoneri) formerly did: though the offence itself, properly speaking, of setting up, in particular instances, the *papal* power against the jurisdiction of the realm, after having been warned against it by writ, (which constituted the original offence) has scarcely in fact existed since the Reformation. A like figurative expression occurs in Tully de legibus, lib. 2. c. 9. where in laying down an imaginary plan of laws for religion, he says, any one who commits *facrilege*, shall be deemed a *parricide* — "*Sacrum sacrove commendatum, qui clepserit rap- sitque, parricida esto:*" that is, shall be treated like a parricide.

Many

Many as remote applications of legal (and perhaps of other) terms may be met with in ancient writers; of which kind a remarkable one seems to occur in St. John's gospel, c. viii. v. 4. λεγουν αυτω, Διδασκαλε, αυτη η γυνη καταληφθη ΕΠΑΥΤΟΦΩΡΩ μοι-
 χουομενη, which, literally translated, is, "this woman was caught in the *very theft*, committing adultery:" but as to the sense and meaning of the passage, it is very well rendered in the common translation, "was taken in adultery in the very act." It is clear, however, this application of the term επαυτο-
 φωρω, is remote and by analogy. For, 1. it properly signifies the taking a person in the act of *stealing* only. Then, 2. by way of analogy, for detection in the actual commission of any other crime, as in the above passage of St. John; and in Plutarch, who has likewise applied it to the case of adultery. 3. It has been more remotely applied to denote such a degree of evidence of the commission of any crime, that is as clear and convincing, as if the person
 F 3 charged

charged was detected in the commission of the
 in which remarkable sense Lyfias has used
 it—οὐδ' ἀπεγραψέτα οὐμὰτα αἰμαίνον
 ἢ αὐτὸν ομολογήσειν· αἰ δὲ μὴ ἐπαυτοφώρῃ σὺν
 αὐτὸν ἐλεξώ. I have dwelt longer on this
 expression, because it has been passed over
 by Grotius and Dr. Hammond in their
 Comments on the passage.

Page 66. line 20. *Giving colour to plead-
 ings has frightened some.*] See Burnet's *Life*
of Lord Hale, page 4. The meaning of
 “giving colour” in pleadings, is explained
 3 Salk. 272, 273. and in Dr. Leyfield's
Case, 10 Co. 90, 2, &c.

Page 69. line 7. *A plea in general.*] A plea
 with us is, strictly speaking, “an answer to
 a charge,” whether of a civil or a criminal
 nature; though the word *Pleading* is com-
 monly applied to the whole written pro-
 ceeding on record. The name itself “Pla-
 citum,” is borrowed from the Roman Law,
 and was there applied principally to the
 judgment

judgment or definitive part of the proceedings; *placitum* being in that sense "*id quod placet*." So Virgil expresses the decree of Jupiter. *Æn.* I. v. 286.

Sic placitum. Veniet lustris labentibus ætas,
Cum domus Assaraci, &c.

In the same manner the "*αρεσον*" of the Greeks, which the French * and other modern nations have contracted to *arret*. And it may be observed, though this language of a *judgment*

Sic volo, sic jubeo, stet pro ratione voluntas, is in high character to express the decree of Jupiter, or of monarchs on earth, as absolute as Jupiter is feigned by the poets; it would neither suit, nor is it copied by our constitution: "*Ideo consideratum est*" is the language of our law in all the judgments that are given and entered on record. *Inst.* 39. And this is certainly a more rational, and a less invidious expression of that power with which the law, in its determina-

* See the Dictionnaire de Trevoux, Voce ARRET.

tions, is obliged to intrust one man over another.

Page 70, line 18. *The plea must not set out matters which amount to the general issue, &c.*] See Hobart's Report, 127.

Page 73, line 12. *The legislature to authorize the general issue.*] This is done now almost in every act that passes.

Page 74, line 3. *Never was made part of the law.*] See above, note to p. 44, line 1.

Page 75, line 4. *Indictment for battery.*] See Clarke and Periam, coram E. Hardwick, 1742. 2 Tr. Atkins, 340. And to the same purpose K. and Grew, 5 Mod. 18. And Hawk. P. C. b. II. c. 25, § 59. and b. I. c. 81. § 13.

Page 79, line 6. *One of our legal Antiquarians.*] Somner on the Ports of Kent, p. 71.

DIALOGUE II. 73

Page 80. line 7. *Comic humour.*] So in Donne's second Satyr.

In parchment then, large as the fields, he draws
Assurances. ——— Pope's 4th Vol.

The same kind of humour is to be met with
in Sir R. Steele's comedy of the Funeral.

Page 82. line 14. *In the common comparison.*] See Essay on Criticism, v. 309.

Words are like leaves, and where they most abound,
Much fruit of sense beneath is rarely found.

Page 85. line 18. *The other great external resource to a kingdom, that of trade, for a long time, did hardly exist.*] Commerce certainly existed at the period here spoken of, though comparatively in its infancy, even long afterwards. See 2 vol. Lord Lytt. p. 173, 215, &c.

Page 86. line 13. *The church, we are told, had a third part of it.*] That is to say, of the land, which was almost the only property in those times. See Lord Lytt. 2 vol. p. 179, and the Authors cited in his margin.

margin. See likewise above, note to p. 31, line 18. — Page 90, line 19. *The forms of conveying used in early times were few and simple.* Very different, however, and even whimsical, as to their dates and execution. Often attested by 17 or more witnesses, even in common feoffments, as Mad. Form. Anglic. 181, &c. But the manner of dating was exceedingly affected; and from the errors, even in that manner, are become intricate: of which I will add one instance and refer to others; it being merely a matter of antiquity, useful only in reading antient deeds. Sometimes they were dated from the lunar cycle, sometimes from the indiction. For the first see Mad. No. 225, where the date is Anno Gratiae 1238, scilicet videlicet Decennovalis quarto — that is to say, the Lunar Cycle, that being the only one of 19 years; and the year is right, because the year 1238 corresponds with the 4th of that cycle.

In

D I A L O G U E II.

73

In a charter of Robert Earl of Moreton, the date is A. D, 1085. indic. 14. concur. tertiâ Lunâ octavâ apud Pevensel. — Here the dates, where intelligible, are wrong; for, by calculation, it will be found, the true indiction for the year 1085 is 8, the Lunar Cycle 3, and the Epact 3. This instance will be found in Dugd. Monasticon, Vol. i. 551. col. 2.

Other instances may be met with in Mad. Form. Anglic. No. 231. 1 Dugd. Monast. 555. col. 2. 2 Dugd. Monast. 959. col. 2. Other instances, 2 Rymer's Foed. 542. Ibid. 367. Ibid. 113.

This subject may be closed with two observations, 1. That in most of the instances I have met with, the calculations are wrong; and therefore we are not much indebted to the monks for introducing astronomy into conveyancing, to mislead, as well as to puzzle us. The rule of Computation may be found in Spelm. Gloss. voce *Indictio*; but much better in our modern Elements of astronomy; and from thence any one (if
it

it is worth while) may examine whether the dates assigned are right. But, 2. Even if they are right, they can be of no meaning, unless the year of our Lord, or of the King, are added; and if they are, of what use is such surplussage and redundancy? For instance, in that referred to 2 Rymer. 542, the date is Anno Dom. 1291. *Indictione quarta Pontificatus Dom. Nicolai Papae quarti anno quarto, et Regni 19 Dom. Regis Edvardi, &c. &c.*

I could not have known here, that the 4th indiction, as it is called, answered to the year 1291, or 19 K. Ed. I. for every period of the Cycle of Indiction has its 4th year; and they cannot all correspond to the year 1291: but if the indiction had been accurately expressed, as the 4th year of the 66th indiction, it might be found that the 4th year of that indiction could correspond only to the year 1291.

Page 95. line 9. *The great weight our ancestors attributed to livery, is better known*

to us than their forms of conveyancing.] That our ancestors, however, were not unacquainted with written forms, even in very early times, and probably on occasion made use of the Greek tongue, there may be some reason to conjecture from the accounts left us by Strabo; who says, the Massaliotæ, or people who inhabited that part of France, about Marseilles, (originally a colony from Greece) spread the knowledge of the Greek tongue so much throughout France, that it "was used in their contracts which were drawn up in that language." Strab. Edit. Casaub. fol. 181. a, and Strabo clearly proves that the Massaliotæ traded with Britain for Tin, Ibid. fol. 147. c. These passages in Strabo, seem to support a reading in Cæsar that is controverted by some of his editors — speaking of the Gauls, he says, "Publicis privatisque rationibus, litteris Græcis utantur," lib. 6. § 14. Hottotman rejects the word *Græcis*; which Dr. Clarke has preserved in his fine edition of the Commentaries.

Page 99. line 5. *The books speak of estates tail, as they may, by possibility, last for ever.]* So 3 Co. 61. a. 6 Co. 43. a. He calls them fettered inheritances, 10 Co. 38. a.

Ibid. line 8. *Lord Coke expressly says.]* See 6 Co. 40. a.

Page 100. line 3. *That these bills were always rejected.]* See 6 Co. 40. b.

Ibid. line 4. *Perpetuities continued for 200 years.]* So Chudleigh's case, 1 Co. 131. b. and more particularly Mildmay's Case, 6 Co. 40. a. b.

Page 101. line 7. *Will of the Duke of Norfolk to that of the late famous Duke.]* Alluding in the first to Lord Nottingham's famous argument in print; in the latter, to the Case on the old Duke of Marlborough's Will, determined in Chancery.
Mich.

Mich. Term. 33 Geo. II. and on Appeal in the House of Lords, Feb. 7. 1763.

Page 102. line 4. *Alienations in mortmain Lord Coke shews.*] 2 Inst. 75.

[Page 103. line 15. *Origin of our modern jointures.*] This reasoning will be better understood by looking into the printed Case of Drury and Drury. Dom. Proc. May 26, 1762. and 1 Lord Raym. 291.

Page 105. line 3. *For the many successful attempts of disposing to a use.*] See the Recitals in the Stat. 27 Hen. VIII. c. 10. and Lord Bacon's reading on that Statute.

Page 106. line 11. *No good man will think of commending.*] Alluding to Lord Coke's observation, 2 Inst. 75.

Ibid. line 21. *Executory Devises came in about Q. Elizabeth's time.*] Fulnerton's Case

Cafe is said to have been the first. Cro. Jac. 592, and recognized, 1 Stra. 130.

Page 107. line 2. *Though they have a small tendency to a perpetuity.*] See Salk. 229. and 2 Eq. Ca. abrid. 337. c. 9.

Ibid. line 21. *Sir O. Brydgeman and Sir F. North invented Trustees to preserve contingent remainders.*] See the reasons annexed to the printed Cafe of Drury and Drury, Dom. Proc. May 26, 1762.

Page 108. line 5. *The books have banded down Sir F. Moore as the first practiser of the common conveyance by lease and release.*] See 2 Mod. 252. and 2 Comment, 339.

Page 111. line 8. *The advice of Lord Coke.*] 3. Co. 36. Butler and Baker's case.

Ibid. line last. *Old Greek will of Theophrastus the philosopher.*] See the Will at full length, preserved in Diogenes Laertius

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tius vit' Theophrast' edit. Meibomii, Vol. i. 296.

Page 112. line 6. *The imputation of loquacity Tully has fixed on the Greeks.]* See de oratore, lib. 2. c. 23. lib. 3. c. 4.

Page 113. line 12. *Lord Coke has pointed out the cause of it.]* In the Preface to his second Report.

Page 117. line 2. *The attempt to render an estate unalienable, which the law abhors.]* See the Case of Stanley and Leigh, 2 Peer Will. 630. and the D. of Marlborough's Case above cited.

Page 118. line 1. *In the feudal times they had other inconveniences.]* These are expatiated on in Lord Bacon's reading on the Statute of Uses.

Ibid. line 2. *The inconveniencies.]* Of perpetuities in general, and of estates tail
VOL. IV. G in

in particular, are recapitulated in a masterly manner, by Ch. J. Popham, in Chudleigh's Case, 1 Co. 138. b. 139. a.

Page 124. line 14. *Many circumstances have occasioned a devise to be considered as an execution of a power.*] This notion was very strongly inculcated by the Court of K. B. in the case of Swift and Roberts, Trin. 4. of the present King; though in the printed Report of that case, that ground of argument is unnoticed. See 3 Burr. 1488.

Page 139. line 7. *As where it is a county cause about a bridge.*] This supposition alludes to a case that happened, Trin. 2 Geo. III. B. R. in which this and several other instances are cited. The name of it is K. and Harris.

Page 162. line 16. *This comes pretty near the method proposed.*] See above, p. 74. line 8.

DIALOGUE II. 83

Page 171. line 8. *Each is only an accusation of a crime.*] Lord Coke expressly says, an indictment is but an accusation, and in lieu of the king's declaration, 9 Co. 118. a.

Page 174. line 3. *If the Grand Jury throw out the bill.*] In what cases see Saville and Roberts, 1 Lord Raym. 374.

Page 186. line 21. *Swift's cow.*] Voyages, 2 vol. edit. Hawk. 446.

Page 190. line 3. *The Law will not permit an affidavit or oath of the party, by going out of the charge, to be made an instrument of Scandal.*] See Astley, v. Young. 2 Bur. 810.

Page 198. line 13. *In Lord Somen's impeachment.*] See the 14th article; to which he has answered, by denying the conclusion. It seems not improbable but some part of his doctrine in the *Banker's Case*, which

leans this way, might be the grounds of this charge.

Page 198. line 18. *Lord Bacon.*] In his reading on Uses, p. 306. of his Law Tracts, published separately in octavo.

Page 203. line 2. *Like Tom Touchy in the Spectator.*] Numb. 122.

Ibid. line 17. *The speediness of justice in Turkey is openly avowed on this principle.*] See Sir W. Temple, Essay on Heroic Virtue, fol. edit. 225.

Page 204. line last. *As Czar Peter had.*] See the Preface to Lord Whitworth's Account of Russia.

Page 206. line 7. *Sir H. Spelman.*] See his elaborate Treatise on the Terms, published in his Reliquiæ.

Page 207. line 19. *Sir Thomas Smith.*] See either his own Book de Republicâ Angl. or Spelman's Reliq. before cited,

Page 208. line 6. *With other countries.*] The Roman Law allowed three years for civil suits. Wood. Imper. Instit. fol. 295.

Page 209. line 11. *Clause in Magna Charta.*] Cap. 29. Mr. J. Blackstone's very elegant edition in folio, p. 55.

Page 210. line 1, *No real poverty is an excuse for the commission of theft.*] Lord Hale and Mr. Hawkins want reconciling to each other upon this point: the latter seeming to have made an allowance in the case supposed, which the law itself does not; and the former, if he is right in his legal position, yet is opposite to that humanity which may seem to arraign the law itself of severity; is certainly, however, at variance with his own conduct, which was ever dic-

tated by humanity: and which often led him to relieve those vagrants, whom, in the capacity of a judge, he would censure as criminals. (See B. Burnet's Life of him.) The passages in the Pleas of the Crown of those great lawyers, to begin with Hawkins, are 1 Hawk. fol. 93. sect. 20, where that writer allows the authorities cited in his margin, that seem to prove the case of extreme necessity to be an excuse from felony, provided the necessity that induced the invasion of another's property did not arise from prodigality, or idleness in neglecting his own. And besides the authorities there cited, it may be observed, Lord Bacon, in his Maxims, adopts the opinion of Stamford; and asserts (without an express limitation as to the cause of the necessity) "that if a man steals viands to satisfy his present hunger, this is no felony nor larceny." Max. Regul. 5 Tracts, p. 55. Lord Hale, on the other hand, totally denies this to be the law of England, from the grounds mentioned in the Dialogue, which seem to be the most

tenable grounds; and from the manifest insecurity of property, if any man might carry in his own breast a dispensation from the law establishing property by an allegation of a necessity, of which, he says, none but the party himself can judge. See Hale, Hist. Vol. i. p. 54. and 566.

This latter reasoning, however, seems not altogether admissible: for this species of necessity seems to be a fact as capable of being ascertained by evidence, as any other case of necessity allowed by the law; of which, many instances are mentioned in the books. Besides, it is impossible to be supposed that when the Jewish law, which, though it did not excuse theft in these circumstances from penalties, yet * did not mark it with the same infamy; and when writers of natural law (some of whom Lord Hale cites) allowed extreme necessity as a plea, that in their idea the truth of it in point of fact could not be ascertained. Lord Hale, it is true, complains, that in France, and elsewhere, the

* See Proverbs, c. 6. v. 30, 31.

Jesuits had made a very bad use of those maxims of natural law, by encouraging theft. Perhaps so, but at this day, by the law of France, it is otherwise. Parochial provision has not yet obtained there, and, excepting some few hospitals for public relief of modern foundation, as at Paris, Lyons, &c. the indigent depend altogether upon the monasteries or private *quêtes*, the latter of which are collected from house to house on the great feasts, and in some places, as at Blois, by some young lady of the first distinction in the parish. But in France, the case of necessity is allowed as a plea against the punishment of theft, or rather, as a very sensible writer has put it, is excluded from the definition of the crime. Theft, he defines from the Roman Law, "*contrectatio fraudulenta rei alienæ lucri faciendi gratiâ, &c.*" and adds, *lorsque on prend par nécessité et uniquement pour s'empêcher de mourir de faim, on ne tombe point dans le crime du Vol.* Vouglans, Instit. au droit crimin. 553.

Lord Hale, however, under the impartiality of a judge, never forgets the feelings of a man; and adds, in conclusion—
 “Though I do agree a judge ought to be tender in such cases, and use much discretion and moderation.” fol. 566.

Page 210. line 7. *Provisions made by law for the poor.* That is, the System of Poor Laws from the 43 Eliz. to this time. Till the dissolution of the monasteries, it has been commonly thought the poor were maintained only by them; but there are some antient ordinances (particularly one in the Mirror, c. 1, § 3.) that look as if parochial provision was always the legal one; and consequently the statute of Eliz. in this case, only revived, new-modelled, and effectuated the Common Law. The words of the Mirror are remarkable.—*Ordeine fuit que les povres fussent susteinus per les Parsons Rectors et les parochians, cy que nul ne morust per default de susteinance.*

Page 211. line 21. *Insolvent laws* — *hu-
mane expedients.*] The King of Prussia's Ob-
servations seem just. *Memoir, Brandenb.*
Vol. iii. p. 134. edit. 4to. Solon, it seems,
brought in laws for the relief of Insolvent
Debtors. Σολων ο νομοθετης Αθηναίων, φίλων
ηττωμένουσ οφειλοντων, ΧΡΕΩΝ ΕΙΣΗΓΗΣΑΤΟ
ΑΠΟΚΟΠΑΣ. *Solon the Athenian lawgiver,
at the request of some of his friends who were
in debt, introduced an abolition of debts.* See
Suidas in Voce Σολων. Perhaps, Suidas
means, that Solon first introduced this kind
of laws into Athens; for Hen. Stephens,
in his explanation of the word αποκοπη,
has cited the very same expression χρεων
εισηγησωτο αποκοπας somewhere from Plu-
tarch, as applied by him to *Lycurgus*;
who therefore had done the same at Sparta
300 years * before Solon did it at Athens.
The most learned moderns have been of opi-
nion that the Decemviral Law “de debitore
“inope in partes dissecando” was made to
enforce a division of the effects or services

* See Dr. Blair's Tables.

of the debtor among his creditor, and therefore in the first case it was something of the nature of our Bankrupt Laws. See Heineccius Antiq. Juris Romani, lib. 3. tit. 30. § 4. p. 159. and particularly Dr. Taylor's very learned Comment on that Law, published 1742. 4to. vindicating the sense and humanity of that construction against the literal interpretation contended for by some the Antients,

Page 213. line 14. *The obligation to satisfy will revive with the power of doing it.]* And of that opinion was Lord Hardwick, 1 Tr. Atkins. 256 ex parte Burton.

Page 215. line 8. *It amerced a plaintiff.]* See the Case of Saville and Roberts, 1 Lord Raym. 380.

Page 216. line 18. *In former times real actions were almost the only suits.]* In support of what is here advanced, see the following authorities: Booth on real Actions, fol. 247. 2 Inst. 511. Madox's Hist. of the

the Exchequer, c. 12. p. 293. and 5 Co.

39.

Page 221. line 20. *Form an acquaintance with Lord Coke against his own directions. He tells them they should first read the later Reports.]* He tells them so in the Preface to one of his Reports; and Sir Harbottle Grimstone, in his Preface to Cro. Car. adopts his way of thinking. The same general advice is to be derived from Lord Hale's admirable Preface to Roll's Abridgement.

Page 222. line 10. *Grotius gives to the study of history.]* See his small Treatise de Instityendis Studiis.

Page 223. line 11. *Out of the old fields must spring the new corn.]* Preface to the first Report, ad finem.

Page 226. line 14. *Dr. Middleton.]* In his Life of Cicero.

Page

Page 227. line 6. *Has copied his part.]*
 For a like sublime idea of the profession of
 a lawyer is expressed in Tully de Legibus,
 lib. i. c. 4. Quid enim est tantum, quan-
 tum Jus Civitatis? quid autem tam exiguum
 quam est munus hoc eorum qui consu-
 luntur. . . . and concluding (c. 6.) et qui
 aliter jus civile tradunt, non tam justitiæ
 quam litigandi tradunt vias. — It is not im-
 probable, but that this passage might in a
 manner be the mould of that cited from the
 Letters on the Study of History, 8vo.
 p. 149.

Page 230. line 14. *Lay People.]* Finch has
 used this expression no less than seven times
 in the compass of two Pages. Law, B. 4.
 p. 381. 2.

Ibid. line 16. *Mr. Madox tells you.]* Hist.
 Excheq. c. 2. § 9. fol. Edit. 41.

Page 226. line 4. *In Dr. Middleton.]* Page

Page

Page 231. line 9. *From the Parliament Rolls.]* The Roll cited is in the Preface to Gibson's Codex.

Page 232. line 1. *Usage pretty well established the common lawyers in the custody of the great seal.]* See the Chronicles of Dugdale, Rapin, and Sir Charles Whitworth.

Page 233. line 1. *Lord Coke says.]* In the Proem to his 2 Inst. p. 3.

Ibid. line 6. *Selden.]* Ad Fletam, c. 7. § 7. fol. 518.

Ibid. line 11. *No evidence of history to explain these words, as they have been understood.]* Lord Lyttelton has proved, that the word "Univerfity" was not for a long time a local term. Vol. ii. p. 328.

Page 234. line 1. *Portefeu and Lord Coke.]* Fortesc. c. 47, 48, 49. Lord Coke's Preface to 3 Report.

Page 235. line 11. *Some dissertations of this kind.*] Particularly by Mr. Agard, Mr. Joseph Holland (the same, I take it, who is mentioned by Lord Coke in his Preface to 3d Report); and by Mr. Whitlock, afterwards a Judge of the King's Bench in Car. I. time, and father of Sir Bulstrode Whitlock.

Ibid. line 13. *Seem to have been fixed in the center of the town.*] So Fortescue describes them, c. 49.

Page 236. line 10. *Map of London in Elizabeth's time.*] In Maitland's History of London.

Page 237. line 15. *The number of distinct houses.*] Lord Coke in his preface to the third Report reckons 14 Inns of court and Chancery, comprehending the two houses of Serjeants Inn; all of which, except Serjeants Inn in Fleet-street, are more or less dedicated to the Law at this day.

Page 240. line 4. *The editor of Sir H. Spelman not quite so accurate.*] For this inaccuracy, is to be laid to the Editor of the Glossary; Spelman having carried it no further than the letter R. See Bp. Gibson's Life of Sir H. Spelman, prefixed to his Remains. The passage censured in the Dialogues, is in the Gloss. tit. *Serviens ad Legem.*

Page 240. line 9. *Apprentice.*] Apprentice and Barrister are understood in general to be the same, 2 Inst. 214. and 2 Tr. Atkyns, 174. Mitchel's Case.

A learned writer of these times (in his Observations on the antient Statutes, p. 279. notes, 2d edit.) seems rather disgusted with the common mechanical sense of this word; and thinks the Profession degraded by the application of the term to any of its members: and from thence labours to show that our old writers have, in reality, been mistaken in their application of it to a liberal profession. He conjectures the word to

“apprentice”

"apprentice" (so used in our books) to have been "an erroneous manner of filling up the contraction ap-de-la-ley; which meant (as he conceives) *appris de la ley*, and not *apprentice de la ley*." — It may be so; but does this get rid of his objection? What is there, in the genuine sense of the word *apprentice*, (which signifies nothing more than a learner) more illiberal than in the word *appris*? Are they not both formed from the same root? But the word is become illiberal, by its application to common trade. — To this it may be observed, that the original sense of words traced to their etymology, will deviate greatly in course of time in their subsequent application: and this flux of language is full as remarkable in the names of *sciences* themselves, as of *professions* and *offices* in life, which are things of a much more variable nature. Perhaps hardly one of either in its present application, corresponds exactly with its original meaning: the reason of that, in many cases, is, that the name,

for common convenience, has all along continued the same, but the thing has not; and therefore in all these cases, the name is sometimes *too great*, and sometimes *too mean*, for the thing it describes. Thus, *History*, as if it comprehended *all knowledge*, is too great in its etymology for an application to a mere detail of facts. Thus *Musick* is a term comprehensive enough for all the liberal arts; and indeed, however confined at present, it is evident from the passages cited * below, that under this term the ancients included Poetry, Philosophy, and what in general are called the Belles Lettres. *Geometry*, on the other hand, which has the range of the universe itself for its field, is too mean a name for the science in its present state. Thus too in offices, the

* See the *Plutus* of Aristophanes, 2 scene, v. 190. Terence's Prologues to the *Heautontim*, v. 23. to the *Hecyra*, v. 15. and Quintil. lib. 1. c. 16. Illis antiquis temporibus *Idem Musci et Pates et Sapientes* Judicarentur: Mittam alios, Orphen et Linu, &c. and so Cic. 1. *Tusc. Quest.*

terms *apprentice* and *clerk**, originally of the most liberal import, and from thence applied to learned Professions, is now perhaps degraded by the generality of the application; as on the contrary, those of *Serjeant*, *Marshall*, *Steward*, are raised from their original, by being used to denote some of the first rank in life, and in the Profession of the Law.

Page 242. line 15. *Dugdale, instead of defining, copies Lord Coke.*] See Co. Preface to 3 Report, and Dugd. Origin. Jurid. 144.

Page 243. line 16. *Like the scholars of Pythagoras.*] The five years silence enjoined by Pythagoras, is touched on by many writers — παροιμία: σιωπηλοτέρους εἶναι καὶ τῶν τε Πυθαγορᾶ τελεσθόντων ΠΕΝΤΑΕΤΗ ΓΑΡ ΧΡΟΝΟΝ ἤσκειν σιωπῇ. Suidas in voce Pythagoras. *It is a proverb; I will be more silent than those that have been*

* See Dial. II. p. 231.

brought up by Pythagoras, for they practised silence five years together. So Lucian, in his auction of Philosophers, when Pythagoras is put up to sale, makes him tell the bidder, that in order to instruct him, he will teach him το μεν πρῶτον ησυχην μακρην καὶ αἰσωπην καὶ ΠΕΝΤΕ ΟΛΩΝ ΕΤΕΩΝ ἀακτεν μηδεν, *first to continue in long unbroken silence, and say nothing for five whole years.* This anecdote of Pythagoras' silence has likewise given birth to some lively Greek epigrams. See Brodæus' Collection, fol. 157. The Indian Brachmans, it seems, injoin seven years silence to their Noviciates. Voltaire Hist. Univerf. Vol. XI. p. 51.

Page 250. line 8. *The Roman laws had scarce any regulations as to Lawyers in the age of the Republic.]* What they had afterwards, see Dr. Taylor's Elements of the Civil Law, p. 39. and Wood's Instit. Imperial Law, fol. edit. 298. b. 4. cap. 1.

Ibid. line 18. *In the Athenian state, orators.]* See Petit Leges Atticæ, Tit. 3. lib.

lib. 3. fol. 18. μη εισελθαι τινά εἰπεν μητρώ τριακοντα, ἐτη γεγονότα, &c. *That no one appear as a public speaker, that has not attained the age of thirty.* See Petit's Comment. fol. 259. Perhaps it may be worth adding, that in Greece the understanding was supposed to arrive at its maturity at the age of thirty, and to begin to decline at about nine-and-forty. αἰμαζα δὲ το μὲν σῶμα ἀπο τῶν τριακοντα ἐτῶν μέχρι τῶν πεντε καὶ τριακοντα· ἡ δὲ ψυχὴ περὶ τὰ εἰς οὐκ ἐν πεντηκοντία. *The body continues in full vigour from the age of thirty till five-and-thirty; but the intellect till within one of fifty.* Aristot. Rhet. b. 2. c. 14.

Dr. Middleton, I remember, observes that Demosthenes first began to distinguish himself in Athens (as Tully did in Rome) at the age of 27; which, if it is an exception to Aristotle's observation, it is certainly no impeachment of the justness of it: because Aristotle, if he is supposed to mean that the understanding in general is in its full vigour at thirty, did not mean to make

genius the standard of human nature. Besides, the *dawn* of genius, like that of ordinary faculties, is surely to be distinguished from its *meridian*. See *Mid. Life of Cic.* edit. 4to. p. 37. It may be added, however, that as to Demosthenes, this point is controverted by Mons. Toureill, both from the authority of Demosthenes himself, and from the inconsistency of Plutarch, on whom Dr. Middleton founds his observation. Toureill, pref.

Ibid. line 19. *In the Athenian State, Lawyers, distinguished merely as such, seem to have been of little regard.*] In support of what is here advanced, without going far back to antient authorities, it may be sufficient to rely on the opinion of an eminent writer, whose researches on the subject of his profession, are in great esteem.

——“ qual’ altra Gente possiamo noi qui
 “ in mezzo recare, la quale colla Romana
 “ potesse in ciò contendere? --- non i Greci
 “ stessi (per tralasciare d’ attri) presso de
 “ quali

“quali l'ufficio de' Giuresconsulti si restrin-
 “geva in cose pur troppo tenui, e basse;
 “e la lor opera si raggirava solamente nell'
 “azioni, nelle formole, e nelle cauzioni;
 “in guisa, che i Professori, come quelli
 “ch'erano della più vile e bassa gente, non
 “venivano decorati col venerando nome di
 “Giuresconsulti, ma di semplici *Pramma-*
 “*torici*.” Giannoni Istoria Civile di Napoli,
 tom. i. lib. i. c. 7.

Page 251. line 8. *Great body of Laws, if
 it is in a great measure the consequence of Free-
 dom.*] See conclusion of the third Dia-
 logue.

Page 252. line 15. *Purity of the profes-
 sion.*] See Justice Mitchel's Case. Tr. Atk.
 Rep. Vol. ii. 173.

Ibid line 20. *As Tully has done*] De
 Oratore.

Page 253. line 16. *The antique masques and revels upon extraordinary occasions*] The writers mentioned in the Dialogue will shew, that no expence or invention were spared in those exhibitions. The times during the reign of Q. Elizabeth, and long after, were surprisngly romantic. In the late publication of Lord Bacon's Letters, by Dr. Birch, the speeches penned by the then Mr. Bacon, on occasion of a device exhibited to the Queen in 1595, on the anniversary of her accession, are preserved; the general design is not altogether unlike the entertainment exhibited to Darius, mentioned in the first book of Esdras, c. 3.

The last revel in any of the inns of court was in the Inner Temple, held in honour of Mr. Talbot, when he took leave of that house, of which he was a bencher, on day, giving the great seal delivered to him.

A friend, who was present, during the whole entertainment, obliged me with the following account; which, with some circumstances supplied by another gentleman then

then likewise present, seemed worth adding here, by way of comparison with those in former times; and as it may probably be the last of the kind, we thought it worth recording. On the 2d of Feb. 1733, the Lord Chancellor came into the Inner Temple Hall about two of the clock, preceded by the master of the revels (Mr. Wollaston) and followed by the Master of the Temple (Dr. Sherlock) then Bp. of Bangor, and by the Judges and Serjeants, who had been members of that house. There was a very elegant dinner provided for them and the Lord Chancellor's officers; but the Barristers and Students of the house had no other dinner got for them than what is usual on all *Grand Days*; but each mess had a flask of claret, besides the common allowance of port and sack. Fourteen Students waited at the Bench Table, among whom was Mr. Talbot, the Lord Chancellor's eldest son; and by their means any sort of provision was easily obtained from the upper table by those at the rest. A large

large gallery was built over the screen, and was filled with ladies, who came, for the most part, a considerable time before the dinner began: and the music was placed in the little gallery, at the upper end of the hall, and played all dinner time.

As soon as dinner was ended, the play began, which was *Love for Love*, with the farce of the *Devil to Pay*. The actors, who performed in them, all came from the Haymarket in chairs, ready dressed; and, as it was said, refused any gratuity for their trouble, looking upon the honour of distinguishing themselves on this occasion as sufficient.

After the play, the Lord Chancellor, Master of the Temple, Judges, and Benchers, retired into their Parliament chamber; and, in about half an hour afterwards, came into the hall again, and a large ring was formed round the fire-place (but no fire nor embers were on it). Then the master of the revels, who went first, took the Lord Chancellor by the right hand; and he, with his

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his left, took Mr. J. Page, who, joined to the other Judges, Serjeants, and Benchers present, *danced*, or rather walked, *round about the coal fire, according to the old ceremony, three times*; during which, they were aided in the figure of the dance by Mr. George Cooke, the prothonotary, then upwards of 60: and all the time of the dance, the *antient song*, accompanied with music, was sung by one Toby Aston, dressed in a bar gown, whose father had been formerly Master of the Plea Office in the King's Bench.

When this was over, the ladies came down from the gallery, went into the Parliament chamber, and stayed about a quarter of an hour, while the hall was putting in order; then they went into the hall and danced a few minuets. Country dances began about ten, and at twelve a very fine collation was provided for the whole company: from which, they returned to dancing, which they continued as long as they pleased; and the whole day's entertainment

was

was generally thought to be very genteely and liberally conducted. The Prince of Wales honoured the performance with his company part of the time: he came into the music gallery incog. about the middle of the play, and went away as soon as the farce of walking round the coal fire was over."

Page 254. line 14. *The raillery our poets have thrown upon the diversions now before us.*] See Dr. Donne, in his Satires—Prior, in his Alma — Pope, in his Dunciad — Not to mention the Dance in the Rehearsal; where that abovementioned of *round-about our coal fire* is meant to be taken off.

Page 260. line 2. *Longinus' comparison of the Odyssey to the setting sun.*] In his ninth chapter, his words are, Ὅθεν ἐν τῇ Ὀδυσσεῖα παρῆλθαι τις αὖ καταδυσμένῳ τὸν Ὀμήρου ἥλιῳ ἔδειχα τῆς σφοδρότητος παραμένει τὸ μέγεθος. Edit. Pearce, 8vo. p. 56. Whether Prior had the latter words

words in view, one can not say; but it is difficult to conceive how the same image could be more accurately or forcibly transferred from one language to another. That lively and most agreeable writer was very fond of copying from the Grecian school, but always in such a manner, as to shew the master where he even meant to imitate; of which this little poem is a beautiful instance: the learned will easily trace in the *looking-glass* of Prior, the poet and his muse (as it may be inscribed) of Moschus. — “Caprice” is the general subject of both Poems; and many images of the latter are transplanted into the former.

See Nouvelle Heloise, partie 1. Lettre 23. and

NOTES

The *Belles Lettres*, in the *Lago Maggiore*, and fall of the *Raine* near *Schaffhausen*, are described by *Kaestler* and other

writers. As to the sinking of the *Rhone*, something may be said here, as it is not so

DIALOGUE III.

from Geneva to *Pont-Bernardin*, very near

PAGE 5. The several scenes, alluded to in the introduction, are so well

known in themselves to most travellers, and have been so often described, that very little

need be said of them here. To the other formal accounts of *the Lake of Geneva*, may

be added, the more picturesque one of *Rousseau*, in his *Nouvelle Heloise*, Lettre

6. and 17. part 4th; who, it may be observed, tho' a citizen of Geneva, has given

a much more pleasing idea of the lake, and of the simplicity of the *Valesians*, than he

has of the liberality of his own fellow-citizens.

See

Mole

See Nouvelle Heloise, part 1. lettre 23. and part 6. lettre 5.

The *Boromean Isles*, in the Lago Maggiore, and *fall of the Rhine* near Schaffhausen, are described by Keyfler and other writers. As to the *sinking of the Rhone*, something may be said here, as it is not so easy to find a description of it in print; considerably to the right, out of the great road from Geneva to Pont-beauvoisin, very near Pont Bellegare, are the remains of a bridge, called Pont de St. Lucè, where the Rhone is interrupted by prodigious rocks, sinks underground after forming a pool of above 100 feet depth, and totally disappears, leaving the several intermediate spaces, between the huge masses of rock that block up the channel, quite dry; and afterwards bursts out again with great rapidity, about a gun-shot from the point where it loses itself. The channel beyond is terminated on each side by very high perpendicular rocks; and the river, it is said, after the melting of the snows, rises there above 30 feet. The

Mole

Mole in Surrey, and the river Arethusa in Sicily (mentioned, Virgil; 10 Eclog. and 3 Æn.) are similar instances of rivers losing themselves underground, and for a space interrupting their course.

The Alps are characterised as the *nurse of everlasting snows* and *pillars of the sky*, images borrowed from Pindar's description of Ætna in his first Pythian.

Κίων
Δ' ἔρπνια συνεχέει

Νιφείσσ' Αἰτνα, παντεῖς

Χιονος ὄρεας τιθῆνα.

The rivers alluded to are the Rhine, the Rhone, and the Tesin, which all rise among the Alps; not to mention several other rapid rivers whose course is more confined.

Page 7. line 3. *Like the travelling of Homer's deities.*] The lines alluded to are these:

Ὡς ἔφατ'· εὖδ' ἀπιθῆσε Θεᾷ λευκώλενος Ἥρῃ
Βῆ δ' ἐκ αὖτ' Ἰδαιῶν ὄρεων εἰς μακρὸν Ὀλύμπον.

Ὡς δ' ὅτ' ἀναιξή νεὸς ἀνέρος, στῆ' ἐπὶ πολλὰν
Γαίαν ἐληλυθώς, φρεσὶ πενκαλιμήσι νοήτη
Εὐθ' αἴμην ἢ εὐθα, μενοεινέετε τε πολλὰ·

Ὡς κραίπνως μεμαυῖα δ' ἱππιατο ποτνια Hen.

Il. 15.

The trembling Queen (th' Almighty order given)
Swift from th' Idaean summit shot to heaven,
As some way-faring man, who wanders o'er
In thought, a length of lands he trod before,
Sends forth his active mind from place to place,
Joins hill to dale, and measures space with space;
So swift flew Juno to the blest abodes.

POPE'S Translation.

Page 9. line 16. *Some allow us nothing but hips and haws.*] See this touched on, Spect. No. 69.

Page 10. line 15. *Addison.*] In the Spectator, No. 393.

Ibid. line 18. *Bishop Berkeley.*] Pope's Letters, Vol. viii. p. 279. Letter I.

Page 11. line 2. *That lively monarch.*] Char. II. who made this observation. See Vol. IV. I Sir

Sir W. Temple on Gardening, folio edition
of his works, p. 181.

Page 13. line 10. *If you can give up that amiable enthusiasm of visiting places famous by tradition.]* This enthusiasm has been finely described by Tully, in more than one place. See lib. 5. de finibus, and de legibus, lib. 2. c. 2.

Page 16. line 5. *The imprecation of the Tartars, in wishing they may live in one place.]* See Bell's Travels to Petersburg, Vol. i. p. 33. 4to edit.

Page 21. line 5. *Parental affection.]* Sir W. Temple considers parental authority in opposition to contract, as the origin of Society. On Government, 8vo edition, p. 60. 63. Thence he concludes the government of a single person is the most natural, p. 82. And yet he calls the consent of the People the Bottom, or Foundation of Government, p. 84, 90. May it not be said

—pergit

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pergit pugnantiæ secum

Frontibus adversis opponere?—

Page 23. line 19. *Would appeal to fact.]*
 Sir W. Temple's great objection to compact being the origin of Society, seems to arise from this quarter, "the want of facts, or any actual compact." Mr. Locke, in deducing from principles, the true origin of Government, was aware this objection would occur; and has answered it from the silence of History. On Govern. §. 100, 101.

Page 26. line 10. *The actual administration of Government.]* This observation is much insisted on in the course of this Dialogue: without a constant eye to it, the Constitution of this or of any other country will be so far from being a thing fixed in its nature, that it may be every thing in its turn: and one might as well mistake the variation of the mariner's needle for the line of direction. It was therefore necessary to set out with, and all along to regard this

distinction. See § 8. p. 28. § 16. p. 55.
§ 18. p. 72. § 20. p. 93. § 68. p. 306.

Ibid. line 17. *Every law (as a wise ancient observed) is a kind of compact, and a security of some right.*] The words of Aristotle, the substance of whose observation is engrafted in the Dialogue, are — Ο Νόμος Σοφικῆ καὶ καθάπερ εἶπεν Αὐτοφρων ὁ Σοφιστὴς ἐγλήστης ἀλλήλοις δίκαιων· ἀλλ' ἔκ οὗτος ποιεῖν ἀγαθὸς καὶ δίκαιος τὰς πολίτας. Arist. Polit. edit. Franc. § 19. p. 74. Dr. Taylor, in his Elements, has paraphrased this admirable passage of Aristotle's; and illustrated it by some citations from the Roman Law. Elem. 154. For a Comment to the latter part of Aristotle's Observation, see Note to page 166.

Page 28. line 16. *Prefixe, and other Historians, tell us Henry the Fourth entertained a project.*] See likewise the Memoirs of his own minister, Sully, Vol. iii. 4to. 382. and before: which project, Voltaire, with

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with his usual scepticism, denies Henry ever entertained any idea of. Essay sur l'Histoire General, Vol. XIV. p. 381.

Page 29. line 4. *Mr. Locke.*] On Government, § 90.

Page 35. line 7. *The Free States of Italy.*] See this admirably deduced in Machiavel's first book of the History of Florence. The same subject is likewise treated of more at large in Denina's *Revoluzioni d'Italia*.

Page 36. line 12. *Mr. Pope, when he says, &c.*] Mr. Pope, however, was not singular in this notion; Sir W. Temple had broached it long before him. See Essay on Pop. Discont. fol. edition of his Works, Vol. i. p. 266.

Page 37. line 14. *Mr. Pope himself had on another occasion, expressed himself very differently.*] See the Letters to Bp. Atterbury, Vol. IX. Letter 4. p. 79.

III. NOTES ON

to Page 40. line 5. *Darius was [sair in his manner of stating the proposition when he asserted, &c.] The original runs thus:—*
Τριων γαρ προκειμενων κ' παντων των λαων
αριτων ενυτων, δημυτε αρις κ' ελιγαρχιας κ'
μοναρχε, πολλω τυτε προχεν λεγω. [For
of the three given forms, each supposed the
best of its kind; that is to say, the best de-
mocracy, oligarchy and monarchy; I insist the
last is by far the most preferable in itself.
Herod. Thalia. lib. 3. § 82. edit. Gale. Bar-
lamqui, who undertakes to discuss this ques-
tion (in his Droit politique) has translated
the whole passage into French, and inserted
it into his text, and says little more. Vol. ii.
part 2. c. 2.

Page 41. line 5. *Government will be*
ever fluctuating.] The King of Prussia's
reflections on this subject are animated and
fine. Mem. Brand. Vol. iii. p. 87—92.
4to edition.

Page 43. line 1. *It is comparatively but of*
late that France has united all its dutchies to the
crown.]

crown.] In Hen. VII.'s time, latter end of the fifteenth century. See Hainault's *Abregé de l'Histoire Franc.* and 3 *Hume*, 20, 29.

Page 44. line 19. *England, with respect to its possessions, or its connections with the continent, was never so strictly an island.]* The interest of England, with respect to continental dominion, in its early history, is finely touched on. Lord Lytt. Vol. ii. p. 93. Ibid. p. 155. Ibid. p. 546.

Page 47. line 1. *A French critick.]* Abbé du Bos *Reflexions Critiques*, Vol. ii. c. 39. p. 382.

Page 50. line 9. *The English constitution has been the subject of much applause to many foreign writers of the greatest eminence.]* For instance, *Montesquieu*, who has a chapter upon it in his *Esprit des loix*, lib. i. c. 6. which does him honour for his idea of it — *Voltaire*, in his *Letters on the English Nation*,
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tion, Vol. iv. of his Works, chap. 21. and chap. 22. And in another work where he goes so far as to say — Il me semble a moi, s'il y a un gouvernement dont on pourroit de nos jours proposer pour modèle de la sagesse, c'est celui d'Angleterre. Le Parlement est l'arbitre du peuple et du roi : et le roi a tout le pouvoir de faire du bien, mais il n'en a point pour faire du mal. — This sentiment is exactly similar to the famous one of M. *Gourville*, mentioned by Sir W. Temple, and which seems to have struck K. Car. II. so much for its propriety. See Sir W. Temple's Memoirs, fol. edit. p. 384. To the above testimonies may be added, that of the D. de *Rocheaucault*, who seems to have had a much better opinion of the English Constitution than he had of human nature itself. See Supplement à ses pensées Reflex. 177, 178, &c. &c. Besides these positive direct commendations, it is easy to meet with many incidental reflections in its favour from foreign historians, quite from the *Sieur de Comines*, Memoirs,

lib. 5. c. 19.) down to the *King of Prussia*; the latter of whom seems to have a tolerable idea of the English government, tho' but an indifferent one of its administration. See *Memoir. de Branden. part 3. p. 124. 271* That too has been the idea of another foreign writer. See *Monf. le Blanc's Letters. Lett. 1. &c. &c.* But, if the exception itself required an answer, there are not wanting even foreign writers to answer it: who have viewed those little inequalities between theory and practice, which must ever happen in the complicated machine of government, as in every other, with more candour and discernment. A passage to this purpose from a work lately published by Mr. de Lolme, will be sufficient for the present purpose — Les corps celestes eux mêmes sont sujets à des alterations dans leur cours; ne cherchons donc point dans les établissemens des hommes une entière régularité — en un mot, ceux qui, après avoir examiné la nature du Gouvernement de l'Angleterre, en considérant les effets, c'est à dire, en viendront à la seule preuve que dans des choses de ce genre,

on puisse regarder come sûre, avoueront qu'il a par dessus tous les Gouvernements, qui nous sont connus, les trois avantages essentiels; de protéger le plus sûrement, d'exiger les plus petits sacrifices, et d'être le plus susceptible de perfection. *Constit. de l'Angleterre*, p. 261, 265.

Ibid. line 17. *Have decided in favour of that mixed form.*] See Mr. Burlamaqui, in the chapter cited above, p. 118. Can an Englishman, independent of the blessings he feels, have in theory a better relish for his own Government and Constitution, than when he finds he actually enjoys what the wise and good in all ages have wished for, and which they pictured to themselves more as an idea, than what was likely ever to become real? Says Plato—*Μοναρχία τυχούσα ἐν γὰρ ἀλλοτρίῳ ἐστὶν ἡ βέλτερος, ἀπὸν νόμον.* A monarchy, whose limits are prescribed by laws, is the best form of all. Plato's *Politicus*, which is the portrait of our own. To this notion of Plato, it will not be disagreeable, it is presumed,

presumed, to add those of Tully, Tacitus, and Polybius to the same purpose.

In Tully, among the fragments of a work we have great reason to regret the loss of, there is this passage: Statuo esse optimam constitutam Rempubicam, quæ ex tribus generibus illis, regali, optimo, et populari, confusa modice; nec puniendo irritet animum immanem ac ferum, nec omnia prætermittendo licentiâ Cives deteriores reddat. De Repub. lib. 2. edit. Olivet. Vol. iii. p. 527.

Tacitus has remarked—Cunctas nationes et urbes populus aut primores, aut singuli regunt; delecta ex his et constituta Reipublicæ forma laudari facilius quam evenire, vel si evenit haud diuturna esse potest. Annal. lib. 4. edit. Gronov. p. 290.

And Polybius to the same purpose—

Ἀλλὰ γὰρ ὡς ἀρίστην μὲν κτήτεον πολιτείαν τὴν ἐκ πάντων τῶν εἰρημένων ἰδιωμάτων συνέσσωσαν· τὴν γὰρ τὴ μερὲς οὐ λόγῳ μόνον ἀλλ' ἐργῶν πέποιθεν εἰληφάμεν· Διὸς οὖν συνησαντος πρώτης κατὰ τὴν τοῦ τρόπου τοῦ Δακιδαιμονίου Πολιτείας.

ΠΙΤΕΥΟΜΕΝΑ. Polyb. Hist. lib. 6. edit. Casaub.
p. 452.

For it is evident, that is to be deemed the best form of government which is constituted from the peculiarities of those simple forms already enumerated: and of this particular we have had proof, not from speculation merely, but from fact: Lycurgus having first given a model of this kind in the constitution of the Lacedemonian government.

Page 51. line 20. King governing according to settled law.] See the Bill of Rights and Act of Settlement.

Page 54. line 17. *Idea of Liberty in society, &c.*] The marquis Beccaria has expressed the same thing in another manner.
 “ L’opinione, che ciaschedun cittadino deve
 “ avere di poter fare tutto ciò, che non è contrario alle leggi, senza temerne altro inconveniente che quello che può nascere dall’azione medesima, questo è il dogma politico, che dovrebbs’essere dai Popoli credato,
 “ e dai

"e dai supremi magistrati colla incorrotta
"custodia delle leggi predicato, &c. § 8.

"and afterwards, Io non trovo eccezione al-
"cuna a quest' assioma generale *che ogni*
"*Cittadino deve sapere, quando sia reo o quando*
"*sia innocente,*" &c. § 11.

Page 56. line 13. *Each possessed of valuable privileges.*] For particulars, it is abundantly sufficient to refer to the first Commentary, p. 159. As to the nature of Privilege in general, Lord Clarendon has given some idea. Hist. B. 4. p. 311. Oxf. edit. folio. But much more may be learned from the Debates in Parliament from the Revolution to our own times.

Ibid. line 17. *Judges assistants to the House of Lords, but are members of the body of the Commons, as they stiled themselves.*] Viz. In the great case of Bridgman and Holt, in the House of Lords. Shower. Ca. in Parl. 117.

Page 57. line 19. *As if the liberty the people were formerly possessed of was rather an act of grace in the crown, than a matter of right in themselves.*] See Tyrell's *Hist.* in the beginning; and Mr. Hume's, in many places, particularly those cited below, on notes to p. 59. See, on the contrary, Lord Lyttelton's *History*, particularly Vol. i. p. 160. Vol. ii. p. 285, 286. which passages, I am happy to find, contain precisely the same idea as what had been before sketched in the *Dialogue*; but traced out in his *History*, with a flow of pencil and richness of colouring that characterises the great master, and sets comparison at a distance.

Page 59. line 4. *Though I am aware the laws which I urge, as a proof of the limitation of the monarchy, are turned against us.*] This is more fully examined afterwards, p. 128, &c.

[*Ibid.* line 21. *Others have argued from the want of Returns to Parliament, to the want of Being of the Parliament itself.*] Mr. Hume's

Hume's Conclusion (Vol. i. p. 390. in the note) seems inconsequential; because, if at other times a representation in Parliament had been ever so general and regular, yet, during the intervals of Parliament, some such measures in those times would have been pursued, as much as if there never was a Parliament. It might as well be said, that issuing the writs for *Ship-money* was a proof, that there was no right of representation in the people; at that time there was no actual representation. So in the times he there treats of, no historical proof is to be had of the representation of the Commons then existing; but the inference, that there was then no such right of representation in the people, seems far from being just; it is at best but only negative evidence. See the Antiquity of the Commons discussed, by Sir Robert Atkyns. Tracts, p. 24 to p. 35. and Lord Lyttelton in his History has denied and refuted the notion in some of our writers, (See Mr. Hume's 2d Vol. p. 46. and *ibid.* p. 93.) that the Earl of Leicester's

Leicester's usurpation, about the year 1265, in Hen. III's time, was the origin of the Representation of the Commons. Lord Lytt. Vol. ii. p. 277 to p. 279. 4to edit. and his Observations on the Stat. 5 Rich. ii. p. 281. An ingenious writer seems to promise an express work, to prove a representation of the Commons before the 49 Hen 3. See Dr. Stuart's Historical Dissertation, p. 281. in the note to part 5. § 2.

Page 63. line 10. *Separation commencing in the reign of Edward the Third.*] Elfyngc cites instances in the 6 Edw. III. and 50 Ed. III. "After the cause of summons was
 " ended, the Commons were willed to *with-*
 " *draw themselves to their antient place* in the
 " Chapter-House of the Abbot of Westmin-
 " ster, and *there to treat and consult among*
 " *themselves,*" p. 104. edit. of 1768, from the Author's MSS. and afterwards, p. 155.

Ibid. line 19. *Lord Chief Justice Hale has observed.*] In his History of the Com-
 mon

mon Law, p. 14, 15. — What is said (from Lord Hale) of drawing up the acts by advice of the king's council, may be explained by a passage in Lord Clarendon's History, B. 2. Vol. i. p. 205. folio edition. Instances enough of the *petition* and *answer* may be met with in the Cotton Collection of Records; and some in Lord Hale's History of the Pleas of the Crown.

Page 64. line 7. *Petition and answer.*] Complaints were made in after-times of the abuses that crept into this practice. See Glanville's Speech in Rushworth's Collect. Vol. i. p. 574.

Page 66. line 7. *Some, by the three estates of the realm, understand the Nobility, Commons, and Clergy.*] Among those who separate the King from the three Estates, are Lord Coke, 4 Instit. 1. and Harrington's Case, 1 Ventris, 325. Bp. Stillingfleet's Ecclesiastical Cases, Vol. ii. p. 273, 384.
Vol. IV. K and

and Dawson's Origin of Laws. Bacon on Government, and Mr. Selden in his Table Talk, p. 83.

Ibid. line 12. *On the other hand, the better part (as I conceive) include the King as one of those estates.*] In support of this side of the question, there are many great legal authorities as well as learned writers. Such as the Roll. 2 Hen. IV. No. 32. in the Cotton Records, p. 407. So the Record Mich. 4 Hen. viii. fol. 3. cited Atkyns's Tracts, p. 36. So Selden's Jan' Anglor. 94. notes 127. So Finch's Law, B. 2. c. 1. p. 81. To which may be added, Bp. Warburton's Alliance, p. 129.

Page 67. line 21. *They must suppose the Clergy in Parliament to be represented by the Bishops.*] Besides what is said in the Dialogue in answer to this supposition, it is refuted in point of fact, by the circumstance of the inferior clergy themselves having
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been

been summoned, and having actually sat in Parliament, either in person or by representation, in the early reigns after the conquest. See 2 Hist. Hen. II. p. 284, 285. and see Elsyng, p. 25. &c. new edit.

Page 69. line 13. *The Commons characterised by the various objects of representation.]* They are so characterised, for instance, by the Stat. de Tallagio non concedendo, 34 Ed. I. Stat. 4. cap. 1. Prelates, Earls, Barons, Knights, Citizens, and Burghesses.

Page 70. line 11. *Their not being tried by Parliament as Temporal Lords.]* So is 3 Inst. p. 30. § 17. Selden Judic. of Parliament, p. 4, 5. The cases of Bp. Fisher and Archbishop Cranmer, are both instances of this kind. See the origin of this, Gilbert's Hist. Excheq. p. 40.

Ibid. line 17. *Decline voting in capital cases from principles of the Canon Law.*] See 3 Lord Lytt. Hist. Hen. 2. p. 328 to 332, Edit 4to.

Ibid. line last. *When their rights were so wickedly attacked, and their removal from the House of Lords, &c.]* This attempt, every one that wishes well to the Constitution, and in that to the Religion of his country, will be inclined to hope will never be made a second time : not but what it has its well-wishers even in these times. Mr. Hume, in his idea of a perfect commonwealth (Essays, Vol. iv.) in order to make the *British Government* the most perfect model of a limited monarchy, suggests, as one alteration, that “the Bishops and Scotch Peers, ought to be removed; whose behaviour in former Parliaments destroyed entirely the authority of that House.” p. 267. 3d edit. After which, he adds, “that the Peers should be elective, and no Commoner should be allowed to refuse a seat offered him.” Ibid.

Page 71. line last. *Suppose a Bill in the upper House, which the Bishops were unanimous against, and the Temporal Lords were as strong for it, I apprehend it must pass.]*

What, at the time of writing the Dialogue, was advanced on mere supposition and speculative reasoning, Lord Coke, it seems, has indisputably established in point of fact and legal authority. 2 Inst. 585, &c. &c.

Page 72. line 7. *Whether the insertion of the consent of the spiritual Lords, should be continued in such case.]* Whatever be the insertion, it is in its nature conclusive. Bro. Abrid. Tit. Parliament, pl. 107. But to shew in some measure, what forms have been used in the cases alluded to in the Dialogue, an instance or two may be given from one of the most interesting periods in the English history, the establishment of the Reformation.

In the Bill for the Supremacy, 1 Eliz. cap. 1. the *Lords Spiritual* are mentioned with the *Lords Temporal* in the petitionary

nary part of the preamble: and yet it is positively said, in the history of that time, that all the Bishops present opposed it. See Camden's Annal. Edit. Hearne, p. 35. And in the enacting part of that very Law, § 2. it runs, *the authority of the present Parliament*, without mentioning particulars.

So in the Statute of Uniformity, 1 Eliz. cap. 2. § 2. it runs in general terms, *the authority of this present Parliament*: but in § 3. the style is more particular; "Be it enacted by the Queen's Highness, *with the assent of the Lords and Commons*," without distinguishing the spiritual from the temporal Lords. The history of that act may be seen in Bp. Burnet's account of the Reformation, where it appears that seven Bishops, and the Abbot of Westminster, dissented from the bill. Five of them had before assisted on the Catholic side, at the conference about religion, held, by the Queen's order, in Westminster-Abbey. The Bishops, during that whole session of Parliament,

liament, were all Catholic. According to Camden there were but fourteen Bishops then living. Whether the rest were present in the House when this act passed, does not positively appear; but the contrary seems rather more probable, as the others absented on passing the Act of Supremacy above mentioned; and all in general were disgusted at the conference being held with such precipitation, without their having an opportunity of consulting the Pope. See Burn. Hist. Reform. Vol. ii. p. 394. and Camden's Annal. 35, 37.

Page 73. line 15. *The argument of a considerable writer turns on the admission, &c.]*
Alluding to Bp. Stillingfleet's Controversy with Lord Holles. Eccles. Cases, Vol. II. 373, 384.

Page 77. line 12. *Borroughs represented by neighbours.]* This circumstance did not escape
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cape the sage Montesquieu in his reasoning on the English Constitution: "L'on
 " connoit beaucoup mieux les besoins de
 " la ville, que ceux des autres villes; et
 " on juge mieux de la capacité des
 " voisins, que de celle de ses autres
 " compatriotes. Il ne faut donc pas, que
 " les membres du corps législatif soient
 " tirés en général du corps de la Nation;
 " mais il convient que, dans chaque lieu
 " principal, les habitans se choisissent un
 " représentant." L'Esprit des Loix, l. 11.

c. 6.

Page 78, line 12. *The writs of Election*]

This appears throughout the Brevia Parliamentaria from the first writ remaining, viz. 49 Hen. III. See 2 Pryn. 29, 32, and several Acts of Parliament have been, at times, made to oblige the members for cities and boroughs to be "resiants, abiding, and free," of the said city or borough.

As 1 Hen. V. c. 4, and 23 Hen. VI. c.

16, (as it might have been imagined) was a

cessary

Page

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Page 80. line 2. *One instance alluded to by Mr. Locke.*] On Government, § 157.

Page 81. line 13. *Ripigliare il Stato.*]

Mach. Discor. Sopra Livio, l. 3. dis. 1.

See this recommended by Sir W. Temple, Vol. i. 258. fol. edit. Essay on Popular Discontents; and by Lord Bollingbroke, in his Patriot King, p. 136. 8vo edit. and in his Letters on History, p. 289, Letter II. octavo edition.

Page 82. line 9. *The prescriptive right to send members would continue.*] See Hobart's Rep. 15. and 2 Lord Raym. 951. in the case of Ashby and White. And 8th Jan. 1693. a Bill was brought in to disfranchise the Borough of Stockbridge: but was thrown out, April 19, 1699. See the Journals.

bid. line 16. *Project of Cromwell's time.*]

See Harris's Life of Oliver Cromwell, and other Histories. This new-modelling too (as it might have been imagined) was a necessary

cessary ingredient in Mr. Hume's idea of a perfect Commonwealth. *Essays*, Vol. iv.

Page 83. line. last. *Boroughs have petitioned against, and abolished their own right of Representation.*] See Willis's *Notitia Parliamentaria*.

Page 87. line 21. *Or his being accountable to his constituents for his conduct.*] Which follows from the doctrine in the 4th Inst. 14. because the particular Representation is swallowed up in the general. But this would be repugnant, if any particular member was liable to have his conduct constitutionally reviewed and censured by the particular constituent.

Page 94. line 17. *I did, however, state that objection.*] Above, p. 75.

Page 95. line 13. *Laws of this and other well-policed states, have secured a landed qualification.*] For one in particular, see

Plinii

Plinii Epist. lib. 6. epist. 19. His expression is strong — *Eosdem patrimonii tertiam partem conferre jussit in ea quæ solo continebantur: deforme arbitratus, ut erat, honorem petituros, urbem Italiamque non pro patria, sed pro hospitio aut stabulo quasi peregrinantes habere.*

Page 96. line 7. *It was admitted.] Scilicet p. 57.*

Page 97. line 10. *The preservation of the Constitution depends on the free action of its several parts.]* Of this, King Charles I. has given in detail a very good idea, commended and copied by Sir B. Whitlock, in his Observations, Vol. ii. p. 308.

Page 99. line 3. *From the time of the Seventh Henry.]* This is the epocha fixed by Lord Bolingbroke, in his Letters on History, p. 177. 8vo edit. Sixth Letter, second part.

Page 100. line 5. *Hen. VII. consented to some Laws made to promote the freer disposal of Estates Tail.*] Our best writers generally suppose that was the real drift of the famous Statute of Fines, passed the fourth year of his reign. A modern writer, in combating the President Montesquieu's commendation of private Feudal Jurisdctions, makes a comparative observation alluding to this step taken by king Hen. VII. "Le private Giurisdizioni Feudali che tanto Il nostro autore raccomanda a i Principi, furono le mine, contro le quali ci volle tutta la prudenza del Cardinale di Richelieu per liberarne quella monarchia, donde ricevono quei Sovrani per secoli interi tanti disturbi. Nè il Regno d' Inghilterra si sarebbe mai condotto a quella tanta felicità a cui lo veggiamo pervenuto, se Arrigo settimo non avesse tagliato la testa a questo orribile mostro. E mostro orribilissimo veramente sono dentro l'ambito di una monarchia le particolari Giurisdizioni: Imperio in Imperio; che vale a dire che i suditi

“diti soffrono il Carico di un doppio im-
 “perio. Piccolo Principe massimo Tiran-
 “no.” Martinelli Lettere Critiche, Lett.
 18ma. The same bad policy which this
 writer remarks of Feudal Jurisdictions, one
 of our greatest lawyers seems to have im-
 puted to our other private subordinate ju-
 risdictions, commonly called “Liberties
 with retorna brevium:” all of which he
 wished to abolish, as being “nothing but
 “a foundation of Brocage and mischief;
 “a feather in his cap that has them, but a
 “thorn in the foot of every one that has to
 “do with them.” Lord Hale’s argument
 in Sir Rob. Sawyer’s Case, 1 Ventris, 412.

Page 102. line 1. *From the disposition of
 the Prince.]* See the Conference between
 King Charles the Second, and Sir William
 Temple, in his Memoirs, p. 32. 8vo edit.

Page 103. line 13. *Lord Burleigh’s max-
 im.]* See Edmund Bacon on Government.
 And the great Montesquieu seems to have
 predicted the same end in other words.

“Perira

“ Petira lorsque la puissance législative sera
 “ plus corrompue che la puissance execu-
 “ trice.” A position, which, whatever
 weight it may have in itself, seems by no
 means to have been answered by Mr. De
 Lolme, c. 23. of his Essay. It is one thing
 to maintain that England will not perish
 from the same causes that made an end
 of Rome, Carthage, and Lacedæmon; be-
 cause there is no analogy between our own
 and those States, in their forms of Go-
 vernment: but it is quite another thing
 to apply Montesquieu’s comparison. He
 barely says, those free Governments have
 perished, others will: which is only saying
 (and it seems is all he meant to say) that
 States are not immortal. He then adds,
 “ England will see that day, when the
 “ legislative power is more corrupt than
 “ the executive:” which is deducing its dis-
 solution from causes peculiar to itself, and
 arising from its own structure.

Page 104. line 1. *Occasional increase of*
Peers.] This was an article of impeach-
 ment.

ment against Lord Oxford. See Article 16. State Trials, Vol. vi. p. 115. And see to this point, Sir W. Temp. Vol. ii. p. 268, fol. edit. Essay on Popular Discontents.

Page 105. line 18. *Incumbering the Revenue.*] See Banker's case, 5 Mod. and Lord Ch. J. Holt's argument in particular.

Page 109. line 5. *Fortescue and Lord Hale.*] Fortesc. 36. b. Hale's Hist. Com. Law, 1. It is Aristotle's distinction of laws, 1 Rhet. c. 3. *Kata ta γραμματα* and *Kata ta ηθη*. and is adopted by the emperor. See Justin. Instit. lib. 1. tit. 2. § 3. A Greek commentator upon Sophocles has exactly the English idea in this division. *Ο νομος εστι συνηθεια εγγραφη η συνηθεια δε αγραφος νομος.* *A law is a written custom, and custom is an unwritten law.* See that very fine passage in the *Antigone* of Sophocles, v. 459.—Not that the being written constitutes the peculiar essence of the former, or is a property incommunicable to the latter (as is explained afterwards, p.

110.) but in England, the authority of the former is deduced from writing necessarily subsisting; in the latter, from invariable usage, whether evidenced by writing, or mere tradition.

Ibid. line 20. *By Common Law, we mean those general Customs.*] See Preface to Sir J. Davis's Reports, fol. 3, 4.

Page 111. line 4. *Or the date of the writing corresponds with the other part of the definition.*] See Hale's Hist. Com. Law, 67.

Ibid. line 16. *Original form.*] Hale's H. C. L. p. 23.

Ibid. line 17. *The general matter of the Common Law.*] See Hale's H. C. L. p. 25.

Page 112. line 7. *Christianity, as well as the Law of Nature, is part of the Common Law.*]

Law.] This is laid down fully in the Case of the King and Curl, 2 Stra. 789, and recognized in a late Case of the King and Annett, M. 3 G. III. a small memorandum of which is in Dr. Burn's Ecclesiastical Law, Title "Profaneness;" it is not reported in Sir James Burrow's account of that period.

Ibid. line 13. *Court of King's Bench styled the Custos Morum of the Kingdom.*] In the Case above cited, 2 Strange, and K. and Annett.

Page 115. line 12. *As in the payment of a Port-duty.*] Alluding to a Case determined in B. R. Trin. 3 Geo. III. Mayor of Yarmouth and Eaton, 3 Burrows, 1402.

Page 116. line 19. *Where Bye-Laws are without Custom, they must be reasonable and for the benefit of the Corporation*] See Lord Raym. cited in the next note.

Page 117. line 13. *The equality of Gavel-kind distribution before the Conquest, was the only mode of descent.]* See the Case of Clements and Scudamore, 1 Will. 63. S. C. 2 Lord Raym. 1024.

Page 119. line 12. *The Poets speak of the Common Law of Greece.]* See a fragment of Euripides cited, Pref. to 2 Coke.

Ibid. line last. *Punishment of one species of petit treason.]* See Cæsar, lib. 6. § 19.

Page 120. line 9. *He has given us the outlines of Excommunication, to enforce an Ecclesiastical Jurisdiction.]* See Cæsar, lib. 6. § 13.

Ibid. line 13. *The duty of private persons to apprehend criminals, and carry them before a magistrate.]* He confines it to matters affecting the state, lib. 6. § 20. As to the duty of private persons to apprehend any one who commits a felony

in

in their presence, see 2 Hawk. P. C. 74. § 1. and the Authorities cited in his Margin.

Page 121. line 2. *His declaration that Gaul copied its discipline from Britain.*] See Cak hb. 6. § 13.

Page 122. line 13. *Explaining the origin of Society, as founded on compact.*] See above, § 6. and § 7.

Page 124. line 4. *An act of Parliament is considered by Lord Hale as a kind of tripartite indenture.*] Hist. C. L. p. 2.

Page 128. line 10. *We often meet with the very words, Rex Statuit.*] See, for instance, Stat. de Winton, 13 Ed. I. and the Prince's Case, in 8 Co.

Page 129. line 15. *The Laws styled the Laws of the Realm.*] This has been the constant language of the King's Coronation oath.

See Stat. 1. Will. Mary, c. 6. preamble, &c. and many other Acts of Parliament.

Page 130. line 12. *Money Bill, &c.*] See, in particular, 8 & 9 Geo. 3. c. 18.

Page 131. line 7. *Many modern acts (and all private acts) have the very language of a petition.*] See, for instance, Stat. 13 & 14 Car. II. c. 12.

Page 133. line 13. *Sometimes, as it has been well observed.*] See Mr. Ruffhead's Preface to his edition of the Statutes, page 7. 4to.

Page 134. line 4. *Sometimes the legislative assent is described by the general word, the Authority of Parliament.*] See 4. Inst. 2.

Ibid. line 10. *An omission in a Recital, Lord Coke says, is fatal.* 8 Rep. 20.

Ibid.

Ibid. line 14. *Parliament itself differently described in different ages.*] See 4 Inst. 2. Preface to 9 Rep. and Glanville, lib. 13. cap. 32.

Page 135. line 20. *Magna Charta passed in a meadow.*] See its History in Mr. J. Blackstone's Introduction, and Lord Lyttelton's Hist. Hen. II. Vol. ii. p. 174.

Page 137. line 4. *Till the reign of Hen. VII.]* See 4 Inst. 26. and 3 Inst. 41.

Ibid. line 20. *An act in force before proclamation.]* 4 Inst. 26.

Page 138. line 3. *Lord Holt admits.]* In the Case of the City of London and Vancro, 1 Lord Raym. 501.

Page 139. line 4. *The observation that all Statutes refer to the first day of the Session.]* See 4 Inst. 25.

Ibid, line 12. *Can it mean that a Law should be in force the first day of the Session, &c.*] Yet some time since the writing this Dialogue, this exposition of the rule has been given in a very strong case, which being a determination of the greatest authority, and in point against the doubt started in the Dialogue, can not with decency be unnoticed here. In the 7th of the present King, an act passed granting a duty of 6d. per pound on the exportation of all Rice, which had been imported from America duty-free, by virtue of an act made that session. The act granting the duty on exportation passed into a Law, by obtaining the royal assent the 17th June that year; some time before this act passed, a merchant exported a considerable quantity of rice, without any duty paid or demanded: on an information in the Exchequer for the duty, the court decreed against the defendant, and on appeal, the House of Lords on a question put to the judges about the time of the act's commencing, and their answer, that by legal

gal relation it commenced, from the first day of the session, the decree below was affirmed. *Panter et al v. Attor. General, Dom. Proc. 25 May, 1772.* Nothing can be a larger exposition of the rule in the books than this case, as the Law was not actually in being, at the time of the act done, which was to be determined by that Law.

Page 140. line last. *And much later instances.]* See these Authorities, 2 Mod. 240. Raym. 191. Styles, 185. 5 Mod. 318. 1 Stra. 446.

Page 144. line 3. *Which Tully so freely censures.]* In his Oration pro Domo.

ibid. line 20. *The Title is no part of an Act.]* See the Case of Literary Property, published in 4to, 1772, and other more ancient authorities.

Page 144. line 20. *The Title is no part of an Act.]* See the Case of Literary Property, published in 4to, 1772, and other more ancient authorities.

Page 145. line 4. *In construction, the parts of an act may explain each other.*] Accordingly this affords a great rule of construction, 3 Co. 59. b.

Ibid. line 8. *The preamble, we are told by Lord Coke, is a key to open the meaning.*] 4 Inst. 330. and 2 Vern. 58.

Ibid. line 22. *Later authorities.*] 1 Peer Will, 320.

Page 146. line 10. *So Tully has it.*] In his book de Legibus, lib. 2. c. 6. Plato, in his 4th Book de Legibus, makes his Athenian observe, that every law ought to have some preamble or introduction, (*προομιον*). Edit. Serran, Vol. ii. p. 723.

Ibid. line 21. *An act of Edw. VI.*] Viz. 1 Ed. VI. c. 12. and the other alluded to, 34 Hen. VIII. c. 8.

Page 147. line 12. *Proviso or savings.*] Sometimes reasoning is drawn from the savings of an act, as 3 Co. 87. a.

Ibid. line last. *In a deed, form has been the growth of time.*] See 1 Inst. 6. a. and Madox's. *Formulare Anglican.* p. 5, p. 30.

Page 149. line 14. *No Act of Parliament, I mean the original Roll, has any stops or paragraphs.*] See 1 Shower, 210, and 1 Will. 316. The use of punctuation and paragraphs, has been lately considered by Sir James Burrow, in an Essay on that subject.

Page 151. line 12. *Private acts not involved in Chancery.*] Hob. 109.

Page 152. line 12. *Variety of cases in our books.*] See Holland's Case, 4 Rep. 75, and many others more modern.

Ibid. line 18. *The Statute of King James.*] Scil. 3 Jac. c. 5. See Hobart, 227.

Page 153. line 7. *Clause in an act about Mr. Hogarth's prints.*] Scil. act 7 Geo. III. c. 38. much about the time of writing this Dialogue.

Ibid. line 16. *The distinction introduced in the reign of Richard the Third.*] See Pref. to Mr. Cay's edition of the Statutes, and the Authority there cited.

Page 155. line 21, and the following. *Trial by Battail.*] See Observations on Ant. Stat. 2d edit. p. 183. 267. and the case in Dyer's Reports.

Villinage.] Observ. on Ant. Stat. 246. *Wager of Law.*] See Slade's Case, 4 Co. and remarks on it in Ch. Justice Vaughan's Reports.

Attaints.] See afterwards, Dialogue, p. 103.

Page 156. line last. *Many of the old Statutes are no other than declarations of the Common Law.*] So is 2 Inst. Show. Ca. in Parl. 64. and 1 Lord Raymond, 397. and the Prince's Case in the 8th Report.

Page 157. line 6. *A Statute that is affirmative only, does not take away Common Law, &c.*] This great principle, that the sanction of an act is accumulative only, and not exclusive, where the remedy in the case supposed existed at Common Law, has been lately recognized in the case of the King and Robinson, where an indictment for disobeying the Sessions was held good, though a particular penalty in that case was given by the act 2 Bur. 799. and in the case of the King against Pitt and Mead, where an information at Common Law for bribery at an election was held good, notwithstanding an action, with a specific penalty, was given by Statute, 3 Burrows, 1339. and since

since in the case of literary property, published separately, 1772. 4to. p. 25, 58.

Ibid. line 16. *But affirmative words.*] See Hobart, 298. Show. Rep. 520. and Plowd. 206.

Page 158. line 1. *Lord Coke asserts.*] Preface to his 2d, 3d, and 5th Reports.

Ibid. line 2. *Lord Bacon.*] Law Tracts, p. 8.

Page 159. line 1. *The same Author.*] Lord Coke's Pref. to 3 Rep.

Ibid. line 17. *The Common Law the basis of Construction.*] So 2 Inst. 208. Saund. 240.

1 Will. 252. and Heydon's Case, 3 Co. 7. b. and Ibid. 78. Ibid. 85. b. 5 Co. 112. b. 6 Co. 34. a.

Ibid.

Ibid. line 20. *Common Law subsists where it is not expressly or virtually repeated.*] And is therefore to be preferred when they concur. 4 Co. 71.

Page 160. line 3. *Statutes in pari Materia to be taken together in construction.*] 1 Ventris, 246. and later Authorities in Burrow's Reports.

Page 161. line 5. *In many of our Books, and no where better than in Plowden.*] Plowden, 465. and see Co. Litt. 24. b. Reading on Stat. Uses in Bacon's Law Tracts, 334.

Page 161. line 18. *Saying a good deal hereafter.*] See p. 174, &c.

Page 162. line 6. *History and manners of the times.*] In which view, the *Observations on antient Statutes*, often cited already in the course of these notes, will always lay the curious reader under great obligations.

Page

Page 163. line 5. *Athenian Law punished idleness.*] See Petit Leges Atticæ, and Meursius.

Ibid. line 12. *Athenian and Roman Law punished ingratitude.*] For the Athenian, see Petit, fol. 51. tit' 8. But it appears from the instances put by Socrates, that the Athenian Law punished only the higher instances of ingratitude, such as that to parents. Xenoph. Memorab. Soci. l. 2. § 13. Edit. Oxon.

The Roman Law punished it in various instances; as in the revocation of gifts for ingratitude. See Authorities in Wood's Imper. Institute, 172. In recalling a Freedman into bondage, for ingratitude subsequent to his manumission. Ibid. 129. and other instances.

Ibid. line 14. *Spartan in Plutarch.*] In the Life of Lycurgus.

Page 164. line 7. *Formerly there were restraints of excess in apparel, &c.*] See various.

rious instances, mentioned 3 Inst. 200, 201.

Page 165. line 4. *Geneva at present.*] Of which Mr. Keate has given a very entertaining summary.

Ibid. line 17. *Formerly flattery and lying were punishable.*] See 3 Inst. 207.

Ibid. line 21. *When religion co-operates with Law.*] That there is in the nature of things, an alliance between religion and government in general, for the reciprocal and common benefit of both, has been showed by several writers; no where with a more elegant and masterly precision than in the Treatise called the Alliance between Church and State. That great and important point is here however only meant to be touched on, as it arises out of the present subject the Constitution of England; and refers to what has been occasionally interspersed in the Dialogues. And, 1.

The

The Law of this country protects the Religion of it, by so far expressly making Christianity part of its system, as to punish open violations of it. (See p. 108.) And at the same time when it establishes a free toleration, as to many points of ceremony, by requiring a strict profession of its doctrines as a necessary test or qualification for admission into the civil offices of the state. (See p. 311.) And to this may be added, by giving no credit in judicial transactions to any assertion not verified by that solemn act of Religion called an Oath; (Dial. 2. p. 186.) and therefore punishing the breach of oaths with such an exemplary severity, as may in that instance protect and preserve Religion itself. 2. If it be asked, In what manner Religion is subservient to Government? The answer may be in one word, by alone furnishing the true vital principle of obedience to laws themselves; without which, their restraints, with all their penalties, are mere cobwebs. It may not be amiss to add one reflection more on this subject,

subject, that the alliance above-mentioned subsists between Religion and Government "only to a certain degree;" that is, as they are subservient to one common interest: but whoever would argue from thence, that they had not each their own particular end in view, independent of each other, would on one side most clearly abolish that Religion, which, from its general principles, tends to preserve both. A sage of Greece * had long ago determined, "*that it was not in the power of laws to make men good*"

* See Aristotle's observat. in note to p. 25. Socrates had shewed before him, that without justice, in the largest sense, a man could not be perfectly obedient to Law; or that obedience to natural or divine Law was necessary to an exact conformity to human Laws. Xen. Memor. l. 4. c. 4. § 18. to which may be added the following passage from Seneca, to shew in his opinion how imperfectly Laws regulate moral conduct. "Quam angusta innocentia est, ad legem bona num esse? quanto latius officiorum patet, quam Juris regula? Quam multa pietas, humanitas, liberalitas, justitia, fides exigunt, quæ omnia extra publicas tabulas sunt? De Ira, lib. 2. c. 27.

and just." It is not, indeed, the intention or end of Government, or of Laws which are made for the security of Government, to do so. For the end of Government in general, is the happiness of man, considered only as a member of society: but the end of Religion, one may venture to say, is the happiness of man throughout his whole duration.

* The conclusion then from what has been said, is this—that Government protects the exercise of Religion, and guards it from open insults: that Religion, on the contrary, more materially serves society, by giving the only genuine active principle of obedience to Laws; and that too, even where the subjects of Laws are of no natural obligation, but founded on the mere exigence or convenience of society: But that Laws themselves are so very far from being a proper standard of Religion or Morality, that there are many vices materially affecting the individual, that they do not restrain; and scarce any of those virtues that constitute

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constitute the peculiar excellence of the Christian Religion, that they command, or even recommend. It was thought unnecessary to give the detail that led to these conclusions; every man's own heart, that comments impartially on his Bible, will do it sufficiently for himself.

Page 167. line 17. *Where it is enacted, the offenders shall be punished at the king's pleasure, means the sound discretion of his judges.]*
So is 3 Inst. 146.

Page 168. line 13. *There is indeed an implied sanction, which, though greater than any positive one, is not what such writers would mean.]* So Burlamaq. l. 1. c. 10.
§ 11. *Remarquez encore qui le mal qui constitue la peine, &c.* And Locke. Ess. B. 2. c. 28. § 6.

Page 170. line 8. *Policrites has shewed.]*
See the Dialogue, p. 120. and the note.

Page 171. line 8. *Montesquieu's Reflection.* *Esprit des Loix.* Liv. 5. c. 18.

Page 172. line 4. *Fountain of Honour.* Lord Bacon has given this maxim a useful turn; and at the same time he has preserved the allegory, has defined the extent of the maxim. *Ess. fol. edit. Vol. i. p. 446. paragr. 7.* See Ch. J. Holt's Argument in the Banker's Case, 5 Mod. The maxim itself, is agreeable to the theory of a celebrated politician. "Li principi debbono le cose di Carico fare amministrare ad altri e quelle di grazia a lor medefimi."

Page 174. line 18. *Lord Hale's meaning.* In his Hist. C. L. p. 66. and p. 68.

Page 175. line 14. *The authority and use of precedents.* See 4 Co. 93, 94. Slade's Case, and 13 Co. 14. b. Ch. J. Wray used to compare a case without a precedent to a bastard who had no cousin, 3 Co. 23. a. And whoever would overturn all use of precedents, has the usage of antient Rome to encounter,

encounter, as well as the Law of England. See the passages cited from the Code, in 1. Comment. 71. And Taylor's Elements of the Civil Law.

Ibid. line 17. *Swift's voyage.*] 2 Vol. Edit. Hawkesworth, p. 447.

Ibid. line 20. *Have been attacked with more severity.*] See Bp. Stillingfleet's Eccles. Cases, Vol. II. p. 112.

Page 176. line 1. *Uncertainty and contradiction of them.*] See Preface to Mr. J. Foster's Disc. on Crown Law, p. 1, 2.

Ibid. line 4. *Has been already said.*] Above,

P. 173.
Ibid. line 17. *Told by Spelman.*] Reliq. p. 99. in his Treatise of the Terms.

Page 177. line 8. *That Chief Justice.*] A remarkable anecdote mentioned in Bur-

net's Hist. of his own Times, Vol. i. p. 571.

[Ibid. line 17. *That Chancellor.*] Viz. Lord Ellesmere; the whole story is in 12 Co. 74. b.

Page 178. line 2. *An opinion that has crept into our books.*] See Co. Litt. § 108, 1 Inst. 81. b. and note to p. 174.

Ibid. line 6. *That opinion is now disregarded.*] See Cro. Eliz. 770. and 2 Lord Raym. 957. and Lord Ch. J. Holt's opinion (in Ashby and White) in answer to that of J. Gould in the same case, who relied on the above opinion in 1 Inst.

Page 181. line 12. *Good old Judge.*] Mr. J. Foster; the passage cited from his Discourses, is p. 2, 3. in the Preface.

Page 182. line 17. *We are even told that many of Tully's are abstracts, rather than*
copies

copies of what he spoke.] Plin. Epist. lib. ii. ep. 20.

Ibid. line 21. Lord Bacon thought, &c.]
See the Dedication of his Argument in the
case of Impeachment of Waste, Vol. ii. fol.
100.

Page 183. line 21. *Collected annually by
persons appointed by the king.]* See Lord
Coke's Prefaces, and Carter's Rep. 91.

Page 184. line 10. *In Rymer's collection.]*
18 Rymer, p. 26.

Ibid. line 11. Lord Bacon.] Law Tracts,
p. 12. The passage in his Letters is, 8vo.
Edit. p. 147. to the Earl of Buckingham.

Page 185. line 2. *The general authority of
Reports is derived from the Imprimatur.]*
What Ch. J. Holt said upon an occasion,
no book ought to be cited at the bar, but
what was licensed by the Judges. (1 Lord

Raym. 537.) is now, and long has been, the general rule.

Ibid. line 7. *Practice of licensing books derived from the Inquisition.*] See the ingenious Argument of the late Lord Chancellor, then Mr. York, in the case of Basket and the University of Cambridge, in Sir J. Burrow's Rep. and Burn's Eccles. Law.

Page 186. line 20. *Uncertainty and contradiction of Precedents.*] See Preface to Sir J. Davis's Report, fol. 9. and note to p. 176. l. 1.

Page 188, line 12. *No case is exactly like another in all its circumstances.*] See 8 Co. 91. and 11 Co. 40. b.

Page 190. line 13. *Lord Macclesfield used to talk of removing land-marks.*] 1 Peen Will. 399. and 1 Stra. 32.

Ibid. line 18. *It is often of little consequence how a point is determined at first, so it is but adhered*

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altered to.] This was Lord Mansfield's favourite maxim, as is evident from the authorities just cited, and many others that follow, viz. 1 Peer Will. 399. Ibid. 452. Ibid. 549. Ibid. 747. 2 Peer Will. 2. Ibid. 99. Ibid. 213. Ibid. 259. Lord Cowper before him had been of the same way of thinking, 1 Stra. 36. and Lord King afterwards adopted the same sentiments, 2 Peer Will. 613. He even used to wish for an act of Parliament to settle certain points that had long been uncertain, *ibid.* 340. and actually brought one in himself to settle the right of the next of kin where the executor had a legacy (alluded to p. 180); it passed the House of Lords, but was thrown out in the lower House, 1 Stra. 569.

Page 191. line 18. *Precedents sub silentio.* See the Case of Q. and Bewdley, 1 Will. 223.

Page 192. line 6. *Lord Coke's topics of legal reasoning.* Those topics are to be found in

in 1 Inst. 11. the opinion of eminent lawyers he there makes his 9th topic. That deference was afterwards paid to his argument at the Bar, 1 Lord Raym. 631. And in the House of Lords, in Drury and Drury (May 26, 1762.) great weight was given by the Lords, who spoke, to the opinion of the generality of conveyancers; who had all along, in forming settlements, proceeded upon a supposition, that an infant might bar herself of dower, though the point had never been judicially determined.

Ibid. line 14. *As has been justly said.*]

In 1 Stra. 153. And see Slade's Case, 4 Co. 93. b. 94. a. Case of the general warrants, determined, since writing this Dialogue, first in Common Pleas, afterwards on error, went on this ground altogether.

Page 196. line 4. *Trial by Jury.*] There is no trusting, in many cases, to the *etymology* of words for their own original, much less for that of the things they denote. Thus,

how

how the assemblage of persons constituted to try facts, come to be simply called Jurors, is not so clear: as the term Juror simply means a person "sworn," and therefore a witness in a cause; or any one who takes an oath of office, might with equal propriety (if usage concurred) be called a Juror.

2. Juries are denoted by other expressions, on particular occasions, as Affize — Recognitors — Inquest — Triers: as the matter or point to be tried, are called occasionally the Issue — the Mise — the Traverse. And this observation is in general necessary, to avoid confusion in our first acquaintance with the Law language, if I may so call it. For this language, consisting of its terms of art, has (like all others) many words to denote the same thing; and the same word often stands for very different things. The reason of which in all cases is this: That such words, in both instances, stand for very complicated ideas: and therefore, though several words do in general denote the same thing, yet (as will appear on a just analysis

of

of the term into its primitive ideas) there is, at least, *one idea not common* to those several words. On the other hand, though the same word does often stand for very different things, yet there is at least *one idea that is common* to those different things; and which, producing a similarity, though in a single circumstance, is the occasion of the same word being so differently applied. The same observation will shew the grounds of metaphorical or figurative language: as is finely explained by Aristotle, in his *Poetics*, cap. 21. and thence I conceive Mr. Locke has, in his *Essay*, inveighed so much against the use of figurative language in subjects that require precision: because metaphorical language would, in those cases, at best be only a pleasing delusion, by substituting pictures for realities, and proportion for identity.

Page 201. line 2. *The practice sub silentio I was speaking of.* Above, p. 191. The case here alluded to, is that of the Q. and

and corporation of Bewdley, already cited from 1 Peer Will. 223.

Page 203. line 10. *The liberty of the Jurors.*] A practice of fining Jurors was attempted, 14 Car. II. See 2 Hale, 311. See Bulhel's Case, which happened the 22 Car. II. in Vaughan's Reports.

Page 206. line 16. *Records of the Mint.*] From which, sufficient data for calculations of this kind may be met with in Mr. Lowndes's Report to the Lords of the Treasury, containing an Essay for the Amendment of the Silver Coin, published 1695.

Page 207. line 3. *It began in Hen. VI. time.*] Before that time, it arose from the bare freehold itself, whatever was the value. So Ch. J. Holt. 2 Lord Raym. 950.

Page 217. line 12. *This established maxim.*] The maxim alluded to, is stronger in itself than it is put in the Dialogue — ad questiones

stiones facti non respondent Judices; ad
quæstiones Juris non respondent Juratores.
Co. Litt. 295. b.

Page 219. line 22. *I never knew a verdict
complained of, as contrary to the direction of
law.]* So Vaughan, 146, 152.

Page 220. line 11. *Littleton and his com-
mentator.]* The passage is from Litt. § 368.
in 1 Inst. 228. And see 2d Lord Raym.
1494. Foster's disc. p. 255, 257. [and the
King and Mayor of Liverpoole. Rep. Temp.
L. Hardwick, fol. 16.

Page 221. line 8. *The law is never sub-
mitted to them.]* So Vaughan, 143. and
see the Dialogue, above.

Ibid. line 20. *Which part of the return
Ch. J. Vaughan said was insignificant, and not
intelligible.]* Vaugh. 136.

Page 222. line 6. *The Ch. Justice does
there put a particular case.]* Ibid. 143, 4.

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Page 224. line 8. *Other scattered publications:]* Since the writing this Dialogue, this question has been the subject of much public as well as private debate; but no argument has as yet been urged strong enough, in the writer's humble opinion, to shake what is submitted upon the principles here advanced; and yet it is hoped it will appear he has by no means slighted, or been inattentive to the topics which he found at that time made use of on the other side the question. He believes too (as far as his information enables him to judge) he has made use of some topics in support of the side contended for, that have altogether escaped those, who have since agitated this question.

Page 225. line 3. *The form of every oath.]*
See 3 Inst, 165.

The oath in Crown cases is not materially different in this respect; nor does that used on the trial of prisoners allow more latitude to the Jury in matters of law. In the oath
for

for the trial of a prisoner, are the words *,
 “well and truly try the prisoner at the bar,
 and a true deliverance make, &c.” There
 is some doubt about the meaning and pro-
 priety of the words, “true deliverance
 make.” 1. They can scarcely have the
 common meaning of “acquitting or dis-
 charging.” For it is hardly consistent with
 the nature of the Jury’s charge, and the
 other words of their oath, “well and truly
 try:” 2. By supposing them to be synony-
 mous to verdict, then “true deliverance
 make according to the evidence,” will be
 agreeable in symmetry to the oaths used in
 Nisi prius and Crown cases. But there is a
 difficulty in getting at this sense of the word
 “deliverance.” It must, for this purpose,
 either be used, 1. Imperfectly, *viz.* for *deli-
 verance of opinion*, by supplying “opinion.”
 Or, 2. By a corruption of *deliberation*; and
 so mean, a true deliberation make: so that
 it means deliverance of the prisoner, not
 absolutely and at all events, but of the

* See 3. Burn. 329. Title, Sessions; and other
 treatises on Crown Law.

Jury's opinion respecting the prisoner's case: nor does the old wish of the Clerk of Arraighs to the prisoner necessarily suppose any other sense.

Page 229. line 7. *The Law not being in evidence.*] See Vaughan, 143.

Page 232. line 10. *Lord Holt's expression.*] Somewhere in Salkeld's Report.

Ibid. line 12. *Lord Bacon.*] In Law Tracts, p. 111.

Page 239. line 17. *Excellently fitted to the convenience of the English government.*] So Lord Hale. 1 H. P. C. 489.

Page 240. line 9. *All torture is disclaimed, even as a punishment, much less is it used as the means of conviction, as in most other countries.*] The celebrated Montequieu has, in this respect, made our government an amiable exception to all others —

voyons aujourd'hui une nation presque bien gouv-
 ernée la rejeter (See the Question) sans s'écarter
 de son droit. *Esprit des Loix*, liv. 16, ch. 17.
 And almost in the same words, the present
 Czarina, in her Instructions for the Russian
 Code. *Nous voyons de nos yeux un peuple*
très vanté par la constitution de son état qui
la rejette sans trouver que l'absence de ce
moyen lui cause le moindre prejudice. *Ar-*
ticle 9, par. 114. and *Mr. Beccaria*, *co 16,*
p. 77. And yet there is no doubt, from
 many unexceptionable authorities, that the
 rack has been used in early times. (*Obser-*
vation on ancient Statutes, p. 63, &c.).
 There is a Letter, not long since published,
 which shews it was even advised by a great
 Statesman in times of acknowledged free-
 dom; of too great freedom, to follow such
 advice. But some times, and some persons
 in the best of times, are the last arguments
 to urge in proof of the Law and Constitu-
 tion. It may not be foreign to add, that the
 K. of Prussia, who expresses such just in-
 dignation

dignation against the rack, which he had abolished in his own dominions, much misrepresents the *peine fort et dure* (to which he evidently alludes) which is inflicted on those who refuse to plead, by calling it a species of the rack. (Mem. Brand. Part. III. p. 148.) The rack, wherever it is used, is used to oblige a man to confess the crime with which he is charged: the *peine fort et dure* is only to oblige him take his trial, and not defy justice by standing mute: the one compels him, in the first instance, to say he is guilty; the other, to make him say only whether he is or is not guilty, in order to make way for the proper proof. This punishment, however, though an instance of it occurs within this century, has been very rarely used: not to mention that the original legality of it is questioned by the ingenious writer already cited in this note, who supposes the word *peine* was inserted by mistake in transcribing the statute of Westminster: and if no traces of this practice appear before that time, Lord Hale's assertion that

it was Common Law, will have less weight; though Lord Hale allows it was doubted. See Hale's Hist. P. C. Vol. ii. p. 321. and 2 Inst. p. 179. and Observ. on ancient Stat. second edit. p. 61, &c. As however the thing itself is at length happily abolished, by an act in the eleventh of his present Majesty's reign, it would not have been necessary to have said so much, only to get rid of the misrepresentations of foreign writers.

Page 241. line 8. *Sweden.*] See Bp. Robinson's Account of Sweden, p. 42. And for the regulations in France of this kind, see Sir W. Mildmay's Account of the Police of France, published 1748.

Page 242. line 15. *The late Empress of Russia.*] See Voltaire's Histoire de l'Empire de Russie.

Ibid. line 19. *The natives of America.*] See the Settlements. Vid. America, Vol. i. p. 176, 3d edit.

Page 245. line 12. *Advanced by Sir W. Temple and the Bp. of Cloyne.*] See Temple on popular Discontents, Vol. i. fol. 265, 266. and Bp. of Cloyne's Querist, p. 125. Q. 53, 54. 161, &c. 381, 389 published in his posthumous Works.

Page 248. line 11. *A French philosopher.*] See une Lettre sur le Progres des Sciences, in Monf. Maupertuis's Works.

Page 249. line 4. *The first trial of inoculation.*] See Dr. Mead on the Small Pox, p. 88.

Page 250. line 2. *Lord Coke closes his History of Crimes.*] See the Epilogue to his 3d Institute.

Page 252. line 1. *Sir Thomas More has indulged himself in many a conceit in his book.*] See his Utopia. edit. Glasg. p. 21, 37, 39, 40.

Page 254. line 17. *Sir Tho. More*] *Ibid*;
p. 40.

Page 255. line 2. *Querist*.] § 389 *Post*.
Works, p. 161.

Page 256. line last. *This scheme has been
offered to the legislature.*] In the year 1752.
See the Journals of the House of Com-
mons.

Page 257. line 10. *For slander and per-
jury.*] 3 *Inst.* p. 163, 198.

Ibid. line 11. *A cut purse.*] 1 *Hale*
Hist. P. C. 222, and 3 *Inst.* 68, 206.

Ibid. line 16. *For House-burning, the fe-
lon was burned.*] 3 *Inst.* 66.

Page 258. line 4. *Partly from religious
scruples.*] So *Ch. J. Baron Gilbert's Rep.*
p. 267.

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Page 263. line 18. *On presumptive evidence.*] See an excellent tract on this subject, said by Bp. Burnet to have been written by Lord Somers.

Ibid. line last. *Etymology of the term.*] See Cowell in voce "Indictment."

Page 265. line 5. *Law allows no council.*] 3 Inst. 29. 137.

Page 267. line 12. *What the party himself, if he was master of himself?*] This Anecdote of Lord Shaftesbury, is to be met with in Mr. Walpole's Cat. Roy. and Nob. Authors, 2 vol. p. 106, second edit. An ingenious writer has (p. 155.) lately considered this subject in his *Principles of Penal Law*, c. 15.

Page 268. line 16. *Parity of condition.*] This principle is much commended by M. Beccaria. *Ella è utilissima Legge quella, che ogni uomo sia giudicato dai suoi pari,*

perchè dove si tratta della libertà e della fortuna di un Cittadino, debbono tacere quei sentimenti che inspira lo disuguaglianza; e quella superiorità, con cui l'uomo fortunato guarda l'infelice, e quello sdegno, con cui l'inferiore guarda il superiore, non possono agire in questo giudizio, §. 14. p. 62.

Page 269. line 17. *Party Juries.*] The instances put, are from 3 Inst. 72, 141. and 2 Hale, 262. By some Acts of Parliament, Party-Juries are expressly excluded, as 13 & 14 Car. II. c. 11. § 11. in suits concerning the Customs.

Page 270. line 8. *The Statute says.*] Cap. 29.

Ibid. line 11. *Lord Coke says.*] In his Comment. 2 Inst. 49.

Ibid. line 21. *Peers.*] The word *Peers* is applied by many of our best writers in the original large sense; for which see Dr. Johnson's admirable Dictionary under the word

word *Peer*, and Lord Bacon's Essay on Ceremony.

Page 275. line 3. *We are to look for the commencements of these Courts at the dissolution of the Aula Regis.*] See Lord Lytt. Vol. ii. p. 227. Ch. B. Gilbert's Hist. Excheq. p. 6.

Ibid. line 20. *Each of these courts had, at first, distinct jurisdiction.*] See the Articuli super Chartas, 2 Inst.

Page 277. line 6. *Already in the custody of that court.*] So 3 Inst. 125.

Ibid. line 14. *Ch. J. Treby.*] In the Banker's Case, reported 5 Mod.

Ibid. line 18. *In Edward III's time.*] Viz. 14 Ed. III. See the Observations on ancient Statutes, p. 202.

Page 278. line 4. *Judges of this Court distinguished by the name of Barons.*] See Madox's Hist. Excheq. cap. 5.

Page 280. line 2. *Its practice of transmitting records.*] Begun on petition, 2 Hen. IV. Rot' Parl. No. 65. 1 Danv. Abridg. 747. Cott. Rec. 411.

Page 281. line 6. *Power vested peculiarly in him of rescinding.*] Or cancelling, as we say. Vid. Cowell. Dict. and Calvin Lexic. Jurid. voce *Cancellarius*. The favourite etymology of some of the old writers, a *cancellis*, as if that Judge took his name from being seen through wooden lattices (as the lions are at the Tower) seems rather too fanciful; not but what even that confined notion may have had some foundation in fact from the form of our early courts, and of which there are still traces; and has its analogy in other law terms, as the word *Exchequer* is commonly derived with us from a checker'd board or chess board. (Gilbert. Hist. Excheq. p. 2. and in the Antient Dialogue of the Exchequer. Mad. Hist. Appen. fol. 3.) and the cheque cloth we see is in use there at this day. — But be this as it will, the

word

word "Exchequer" is a local term; that of "Chancellor" is a general one; and therefore calls for some origin of a much more extended application.

It should not however be omitted, that Giannone, who in his excellent work, has touched on this subject, leans very hard indeed against the etymology derived from the *exercise* of the Chancellor's power, in favour of that drawn from the nature of the *place* in which he exercised it; his reasoning being somewhat curious, the whole passage follows. — Perchè fosse chiamato Cancelliere, non è di tutti conforme il sentimento. Il Vecchio Glossario dice, che fosse così detto, perchè appartenendo a lui l'esaminare tutti i memoriali, che si danno al principe, avea potestà di segnare ciò che pareva a lui, che potesse aver camino; e di Cancellare le importune dimande, dando di penna su i memoriali con tirar linee sopra di quelli per lungo e per traverso a guisa di cancelli. Ma questa è una molta strana etimologia, che dovesse prendere il Cancelliere

il

il suo nome più tosto da ciò ch'egli disse,
che da quello che fa. Meglio interpre-
tarono Cassiodoro e Agatia, che lo bide-
rivarono a *Cancellis*; poichè dovendo questo
ufficiale sopratendere alla spedizione di tutti
i rescritti del Principe, sentire tutti oglofo,
che gli presentavano i memoriali, acciocchè
non fosse premuto dal popolo, ed all'incun-
tro da tutti fosse veduto, soleva stare fra
Cancelli, siccome si praticava in Roma ed in
Francia; ond'è che Tertulliano soleva dire:
Cancellus non adoro, subsellia non contun-
do." *Istoria Civile di Napoli*, tom. 12.
p. 260. Edit. 1762.

"Ibid. line 18. *The progress of equitable
jurisdiction seems to have been in this man-
ner.* See the *Articuli super Chartas* passim
2 Institute.

Page 282. line last. *In these days sprang
feoffments to uses.* See Lord Bacon's read-
ing on the Statute, 1 Lord Raym. 299.
and 1 Co. 101, b.

Page 283. line 8. *The common division of fraud, accident, and trust.*] See 2 Eq. Caf. abrid. p. 243. cap. 11. and the Reports there subjoined.

Page 284. line 16. *The general ground of going into equity is the want of remedy at law.*] Lord Talbot has well explained this in the Cases of Heard v. Stamford Forresters, Cases 174. And in Morrice, Vid. Bank of England, Ibid. 222.

Page 285. line 15. *A recovery in one action at law, will be for ever a bar to a recovery in another.*] To this there is only one exception, that of "Ejectments," which, however, is become the principal mode of trying titles to land at this day: and as it does not appear that the reason of an "*ejectment being never final*," is any where laid down in the books, though the position is frequent, it may not be amiss to consider it in a few words. The reason why it is not, or can not be final, seems to be
this

this — that it is impossible from the structure of the record in this action, to plead a former in bar of another ejectment brought;” because, 1. The plaintiff and defendant are nominal, and exist in most cases on record only: and consequently may be changed in a new action. But the identity, both of plaintiff and defendant, must be averred in pleading a former action in bar. 2. The term demised may be laid many different ways. An ejectment however, though in its nature not final at *law*, is capable of being so in *equity*: and it appears from several authorities, that the court of Chancery will, on proper grounds, grant a perpetual injunction; and not permit the possession of lands to be disturbed by a vain incessant litigation of the same question. See the Cases of the E. of Bath and Sherwin, 2 Eq. Ca. Abr. and Leighton v. Leighton, 1 Will. 671 and 2 Stra. 404. It may further be observed, that as the plaintiff is not to be concluded by a single defective trial in ejectment,

ejectment, even though a judgment has been had consequential to the trial: so, in every other case "before a judgment is signed," either party may have a new trial, where the first appears to the court to have been defective. And that being so very remedial a provision, (and what for a long time has been so liberally adopted in courts of law,) is a very good reason why, in every other case, a judgment once had, should be a perpetual bar to a recovery in another action on the same specific merits.

Page 287. line 4. *A prisoner who has once had a verdict passed on him, can never have a second for the same offence.* Nothing is so clear, as that no one shall be tried twice for the same offence; but till a verdict, either of acquittal or conviction is given, no trial has been had. A remarkable instance to illustrate this, happened at Dorchester Summer Assize, 1763 on account of which being in print, may be added here. One Gould and his wife were indicted
for

for the murder of a parish apprentice; at the trial, before all the witnesses indicted on the indictment had gone through their evidence, one of the jury dropped down in a fit, and was carried out of court; but not being in custody of a bailiff, the whole jury was necessarily discharged. The judges were of opinion that the prisoners were not discharged by this accident, this being no trial at all; but as the case was uncommon, if not new, the prisoners were remanded till the next assize, in order to lay the case, in the mean time, before the twelve judges. The twelve judges were afterwards unanimously of opinion, that the accident which happened to the juror was no bar to any future trial: the prisoners were accordingly tried at the next Lent Assize, and acquitted on evidence. At the time the accident happened, and the jury were discharged, it was contended by the prisoner's counsel, that the prisoners were absolutely discharged by this event, and could not have their lives brought again

into jeopardy; and Eliz. Meadow's Case in Mr. J. Foster's Discour. p. 76. was insisted on as an authority. She was seized with pangs of labour during her trial, and was thereupon ordered back to prison, and the Jury discharged. But J. Foster said afterwards, in talking over the above case, that (though he had by accident omitted it in his printed report) her pains going off, she was afterwards tried on the same indictment that very session.

Page 289. line 14. *But the offence is double.*] The natural grounds of the State having a right to punish a crime, where the party injured gives up his right to satisfaction; or of the State having a right to pardon the crime, where the right of satisfaction remains in the party injured, is well explained by Burlamaqui, liv. I. part 2. c. 10. § 11. And see the difference between civil Satisfaction and Punishment. Ibid. Vol. ii. b. 3. c. 4. § 14. and M. Beccaria, c. 29. p. 139.

Page 291. line 2. *The universal gradation of appeal.*] The right of appeal in every case, and the subordination of appeals, is finely touched on in many considerable authorities. K. and Knollys, 1 Ld. Raym. 15. Dr. Bentley's Case, 1 Stra. 565. Lord Derby's Case, 1 Peer Will. 330. Dr. Groen-volt's Case, 1 Lord Raym. 469.

Ibid. line 11. *Without this reservation.*] It may be observed the remedy of appeal was devised in the early ages of the world, and indeed seems coeval with that of the delegation of Judicature to inferior powers. It was Jethro's counsel to Moses; and Moses, himself under divine inspiration, approved of it. Exod. c. 18. v. 22. to the end.

Page 292. line 12. *Writs of Certiorari from temporal courts.*] So is 2 Lord Raym. 836.

Page 293. line 15. *The case of College Visitors, as standing without appeal.*] See Parkinson's

Parkinson's Case, Carth. 92. Philips and Bury in many of the Law Books, and the late Case of St. John's College, v. Toddington and the Bp. of Ely, in Sir J. Burrow's 1st Vol. and note to p. 291.

Page 296. line 4. *There is something so noble in this last great stage of Appeal.*] The exceptions that Sir W. Temple says were taken to some particulars of it in his time, have been in many respects guarded against by subsequent regulations; and in general prevented by the course of education. See Sir W. Temple's Works, Vol. i. fol. 269. That passage is considered by Bp. Ellys in his Tracts, on Temporal Liberty, p. 44. &c.

Page 297. line 21. *Institution of circuits.*] The antiquity of this institution is considered in Lord Ch. J. Hale's History of the Common Law, c. 7. p. 141. And his authority relied on in the History of the reign of King Henry the Second, Vol. iii. p. 206, &c. See afterward, note to p. 302.

Page 299. line 5. *Romans prohibited a judge, &c.]* That is the Assessor. See Wood's Imper. Institute, fol. 296. The same, it seems, is the antient law of China. Volt. Hist. Univers. Vol. xiv. p. 174.

Page 300. line 9. *Made penal by the stat. Rich. II.]* The several Statutes here alluded to, are the 8 Rich. II. c. 2. the 33 Hen. VIII. and the 12 Geo. II.

Page 302. line 17. *It may be difficult to say how antient this institution is.]* At the time of writing this Dialogue, it was meant to leave this point to the possible ecclaircissement of the noble Historian (who had not then published the latter part) of Henry the Second, in whose reign the institution of Circuits has been commonly supposed to commence. But the records there cited from Madox, plainly prove that the institution of Justices in Eyre, which is the undoubted original of that of Circuits, is of a much higher, and indeed, as Mr. Madox concludes,

clodes. of unknown antiquity. See Madox
Hist. Excheq. c. 3. § 12. p. 84. first edi-
tion.

Page 304. line 8. *The stat. of Westmin-
ster.*] Westmin. 2. c. 30. in 2 Inst. 423,

424.
Page 305. line 21. *Milton.*] In his Al-
legro.

Page 307. line 3. *Sir H. Spelman says.*] In his Remains, p. 49. on the antient Go-
vernment of England — To what has been
touched on in the Dialogue, may be added,
that the distribution of the ecclesiastical state
has a great analogy to that of the civil po-
lity, the latter being divided into counties,
hundreds, tythings, hamlets, vills: the
ecclesiastical into provinces, dioceses, arch-
deaconries, parishes. Though it may be ob-
served, *diocese* (as its original import will
sufficiently warrant) has been used in old
laws for the *civil* state of England itself, as

in Stat. 14. & 15. Hen. VIII. cap. 5.
sect. 3. about the College of Physicians.

Page 313. line 11. *As Tully has said.*
In his Oration pro Milone, edit. Olivet.

Page 314. line 21. *Any person may quit
his native country for ever, &c.]* But it
is generally agreed, can never divest him-
self of his native allegiance to his country;
so that he must be deemed a rebel if he
fights against it, not any enemy. See Cal-
vin's Case, 7 Co. and a Letter from Sir
Leoline Jenkins to Sir W. Temple upon
this subject. Sir Leol. Jenk. Letters, Vol.
II. p. 712.

Page 316. line 6. *The Constitution enables
the King to restrain by writ, in certain cases,
from departing the kingdom.]* Lord Ch. J.
Hale's Analyl. 19. The law books are full
enough of instances of the writ of "*ne
exeat regno*:" In some cases it has been
deemed expedient to make a particular
provision

provision by act of Parliament, as in 1721, to restrain the South-sea directors; and in 1733, to prevent the trustees of the Charitable Corporation from quitting the kingdom.

Page 317. line 17. *Where foreign laws are the grounds of the contracts.*] See many instances in Robinson and Bland, 2 Burrows, and the case of the French Will in Shower's Cases in Parliament, and the Jewish Marriage Settlement in Dom' Proc' 1762.

Page 318. line 14. *The case in which this point arose.*] Alluding to the case of Robinson and Bland, since reported by Sir J. Burrow, in his second Volume. At the time of writing this Dialogue, a similar instance of a much more alarming nature arose from a question on the marriage act, whether the marriage of English subjects going into Scotland merely to evade the act, and there celebrated, was valid within that act?

The apprehensions of the world on this subject have been since quieted by a solemn determination of the Court of Delegates; the Judges being clearly of opinion, that the Legislature itself, by the proviso in the act, had absolutely excepted all marriages in Scotland, and not left it in the power of construction to say what marriages were good in Scotland, and what not. This was determined at Serjeant's Inn, in the case of Copton, appellant, v. Bearcroft, respondent, Feb, 4, 1769.

Ibid. line last. *Will give credit to the proceedings of foreign courts, &c.* Carthew, 32, and 2 Eq. Ca. Abrid. 475, and other authorities. And in a late Case in the House of Lords, March 4, 1771, the determination turned on the general principle of the credit *ex comitate* to be given to foreign competent jurisdictions, "the Lords declaring by their decree, that the judgment of the supreme Court in Jamaica ought to be received in Scotland, as evidence

deheu prima facie of the debt : and that lit
 died on the other side to impeach the justice
 of it. *Sinclair, v. Frazer et Al.* See like-
 wise many Cases in Vezey, and other late
 Reports.

to Page 319. line 18. *Lord Coke's doctrine on
 this point.* In 3 Inst. 180.

to Page 320. line last. *Bp. Burnet, I re-
 member, relates his own case.* 2 Hist. 729.

Page 323. line 1. *Same as pursuing an
 enemy's ship into a neutral port.* Ipsum
 v. hollis territorium ingredi et ibi prædam
 agere ratio belli permittit. In medio
 Mari, utpote nullius territorio, id ipsum
 licet: in territorio utriusque amici qui hos-
 tem agit, agit et adversus Principem qui
 ibi imperat, et omnem vim a quocumque
 factam legibus coercet, &c. says Bynker-
 shoek, in his *Quest. Juris Publici*, b. 1.
 c. 8.

Page 324. line 7. *As Tully did, speaking of Plato.]* In his 3d Book de Legibus in Præmio.

Ibid. line 12. *All along taken for granted.]*
See the note to p. 26.

Page 332. line 18. *Atalantis.]* Meaning a fragment of Lord Bacon's under that name.

Page 326. line 18. *Lord Hale.]* In his History of the Common Law — But this has been since done with higher finishing in the last chapter of the 4th Volume of the Commentaries, not published at the time of writing the Dialogue.

Page 334. line 12. *Aristotle and Sallust.]*
Aristotle Polit. lib. 2. § 8. P. 44. Edit. Francfort, τὰς ἀρχαίων νόμους διὰ τὴν ἀρετὴν εἶναι καὶ βασιλευσιν — — — ΕΥΘΟΗ καὶ ταπεινὰ.
And Sallust Bell. Catil. sect. 6. and sect. 9.
Settlements in America, Vol. i. p. 181.
And in China, their whole policy is founded rather

rather on family government than positive Law, as Montesquieu, Voltaire (Vol. ii. p. 28.) and other writers observe.

[Page 335. line 9. *One reason why many Antient States were averse to Commerce.*] See an ingenious Dissertation on this subject in Dr. Taylor's Elements of the Civil Law, p. 496. and the Duc de Sully's reasoning with Hen. IV. livre 6. of his Memoires.

[Page 336. line 4. *For a Fable.*] Alluding to the Fable of the Bees, which is happily rallied in the Minute Philosopher, Dial. II.

[Page 337. line 4. *Persian School of Justice.*] Alluding to Xenophon's Account of the Schools of Equity among the ancient Persians. οἱ μὲν δὲ παῖδες εἰς τὰ διδασκαλεῖα φοιτῶντες, διαγῶσι μανθάνοντες δικαιοσύνην, καὶ λέγουσι οὐκ ἐπὶ τῷτο ἔρχονται, ὡς περ παρ' ἡμῶν εἰς τὰ γράμματα μαθητομένοι, &c. &c. *Their children*

children in the Schools pass their time in learning the principles of Justice; and (as it is affirmed) are sent there for that particular purpose, as with us, to acquire learning. Edit. Hutch. p. 9. Cyri Inst. This admirable Institution of theirs is touched on in a paper in the Spectator, on Education, Vol. v. Numb. 337.

I can not conclude the whole better, than with that fine reflection of Tacitus on the Domestic conduct of Agricola. — *Ani-
morum Provinciæ prudens, simulque doc-
tus per aliena experimenta, parum profici-
armis, si injuriæ sequerentur, causas bello-
rum statuit exscindere. A se suisque orsus,
primum domum suam coercuit; quod ple-
risque haud minus arduum est, quam Pro-
vinciam regere.* Vit. Agric. § 19, p. 468.
Edit. Gronov.

THE END.

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